THE HANDBOOK ON GUARDIANSHIP AND THE ALTERNATIVES

AN EXPLANATION IN SIMPLE TERMS OF GUARDIANSHIP, CONSERVATORSHIP, AND OTHER OPTIONS.

MENTAL HEALTH LEGAL ADVISORS COMMITTEE

December 2007

The Mental Health Legal Advisors Committee

The Mental Health Legal Advisors Committee (MHLAC) helps children and adults with mental disabilities protect their rights and obtain appropriate services. We are an independent state agency of the Supreme Judicial Court that can provide advice and direct legal representation to our clients on a wide range of legal issues including access to services, rights regarding treatment, custody and visitation, guardianship, insurance issues, education, housing, and rights in institutional settings. In addition to providing direct representation, we also hold trainings for advocates and clinicians, interpret and analyze legislation, and produce brochures and longer publications on legal matters pertinent to mental disabilities.

If you wish further information on a mental health matter, you may call MHLAC's Intake Line. The line accepts messages Monday, Wednesday, and Friday from 8:30 a.m. to 1 p.m. at (800) 342-9092 ext. 20.

PREFACE

The Mental Health Legal Advisors Committee (MHLAC) is dedicated to protecting the civil rights and liberties of individuals with mental illness. In addition to direct representation and legal assistance, MHLAC provides information and education to help individuals with mental illness and their families understand their rights and responsibilities in various legal processes. To that end, the Committee has produced a new edition of THE HANDBOOK ON GUARDIANSHIP AND THE ALTERNATIVES, referred to as **The Handbook.**

The appointment of guardians for persons who are or are claimed to be under any mental disability has long been a topic of concern for the Committee. MHLAC's first publication on guardianship was published 1984 and last revised in 1993. Today the need to focus our attention on guardianship is even more compelling. As the June 2007 report of the Supreme Judicial Court's Access to Justice Commission points out:

The fundamental problem is that the interests of a person for whom a guardian is sought are not adequately protected in the system. The absence of safeguards in the appointment of a guardian for an allegedly incompetent person is troublesome.[1]

Because legal guardianship is so restrictive of personal liberty and can be imposed without basic safeguards, this revision of The Handbook puts emphasis on the alternatives. We are hopeful that concerned family members and well intentioned mental health professionals who consider guardianship will better understand the alternatives available. Also, we hope that those who encounter difficulties in the guardianship process and find the process unsatisfactory will join legislative efforts to reform guardianship law in Massachusetts. MHLAC has long advocated for legislation proposing a public guardianship commission and adoption of the reforms in article five of the proposed Massachusetts version of the Uniform Probate Code.

The Mental Health Legal Advisors Committee acknowledges and greatly appreciates the work of the many individuals who contributed to the publication of this 2007 edition **The Handbook.** William Landers, a volunteer attorney at MHLAC, drafted the initial revisions and updates. MHLAC staff attorney Miriam Ruttenberg took the lead on the research, editing and final drafting. Laura Colby completed the layout and design. Law students Sam Dotzler and Kristin Musto provided essential research and editorial assistance as did Americorps member Lyndsey Frushour.

1 MASSACHUSETTS ACCESS TO JUSTICE COMMISSION, Barriers to Access to Justice in Massachusetts: A Report, with Recommendations, To the Supreme Judicial Court, June 2007

MHLAC thanks David B. Clarke and Robert Fleischner who reviewed and commented on portions of this book. We also thank David Clarke and Robert Weber for allowing us to reprint their sample health care proxy forms in Chapter 5.

All the individuals who offered their assistance and suggestions improved the quality of this edition. Any errors or omissions are MHLAC's alone.

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INTRODUCTION

Mental Health Legal Advisors Committee (MHLAC) is a Massachusetts state agency that advocates for the legal rights of people with mental disabilities. We approach all inquiries for assistance from the perspective of the person with the mental disability, regardless of who contacts us. MHLAC often fields calls from family members, concerned friends, and agencies. Callers typically seek advice on getting guardianship of a family member or friend who may be struggling with significant mental illness or other mental disability. We provide this Handbook (updated from earlier versions) to answer some basic questions, but more importantly to explain how guardianship significantly limits a person's autonomy, changes the relationship between guardian and ward, and may not, in fact, provide the protection the caller is seeking (or the option to best help the ward).

This Handbook does not provide legal advice and is not a substitute for seeking legal advice from counsel. This Handbook is not a substitute for the lengthy treatises on guardianship that are available. It also is not a "how-to" guide for getting a guardianship or conservatorship. This Handbook is designed to explain guardianship and conservatorship, and to discuss *alternatives* to guardianship. While we do provide some basic information about the requirements for guardianship and the process in Massachusetts, this book also discusses the possible limitations and drawbacks of guardianship. MHLAC staff hopes that as a result of reading this book, the families of persons with a mental disability will thoughtfully consider the strengths and abilities of that person in an attempt to engage in alternatives to guardianship.

Part I begins with important matters to consider before seeking a guardianship or conservatorship, and also explains guardianship and conservatorship generally. It then highlights special issues, including guardianship of minors and *Rogers'* guardianships (see glossary). Part II describes alternative legal mechanisms to guardianship and conservatorship, such as trusts, representative payees, powers of attorney, and health care proxies. Part III includes some basic information on the mechanics of petitioning for and objecting to a guardianship, internet resources, and Massachusetts court and social service agency information, as well as a glossary of terms.

The information provided in this Handbook is based on Massachusetts laws and regulations, and does not necessarily apply to people who live in other states.

Guardianship is not the only option for an incapacitated individual. There are a number of less restrictive alternatives better suited to protect the individual and his or her personal autonomy.

Personal autonomy is basic to adulthood and independence. The right to make important life decisions and the right not to be under the control of another individual must be zealously guarded for individuals with mental disabilities. There are times when a person may be so severely disabled that substantial harm would result unless someone assumes decision-making responsibility in one or more areas of life. In many cases, however, less restrictive alternatives exist that can provide necessary protections as well as preserve basic rights.

Guardianships and conservatorships have become common tools for family members and social service agencies to use when they believe that a person's mental illness or other mental disability prevents him or her from making "appropriate" choices. Often a family member will be advised by an already involved agency, medical provider, or even a clerk at the probate court, to seek a guardianship when the family member believes that the person with mental illness is not attending to his or her affairs the way the family member believes he or she should. However, in our society, people are legally allowed to make poor choices for themselves. Family members and other concerned parties must be aware of the distinction between making poor choices or different choices and the *lack of capacity* to make good choices. Lack of capacity, or incompetence, is the only legal basis for a petition for guardianship.

It is imperative to realize how these legal tools, particularly guardianship, can drastically subvert a person's independence and autonomy and to therefore resort to their use only when all other options to address the person's limitations while still attempting to preserve their self-determination have been exhausted.

The law in Massachusetts presumes a person's competency or capacity, and the burden is on the person bringing a petition for guardianship to prove otherwise.

PART I
GUARDIANSHIP AND CONSERVATORSHIP

A person petitioning for guardianship must prove that because of mental illness (or mental retardation) the proposed ward is incapable of taking care of himself or herself. The Massachusetts Supreme Judicial Court (SJC) has said that the statutory language "incapable of taking care of himself by reason of mental illness" means that the person is generally unable to manage his or her own personal and financial affairs because of mental illness. *See* Fazio v. Fazio, 375 Mass. 394 (1978). The SJC further has said that the evidence required for such a finding of incompetence should include evidence of a mental illness, and also "facts showing a proposed ward's inability to think or act for himself as to matters concerning his personal health, safety, and general welfare, or to make informed decisions as to his property or financial interests." Fazio, 375 Mass. at 403.

There are significant responsibilities that go along with being a guardian or conservator. A guardian is legally obligated to protect the ward and his or her assets. A guardian must periodically account to the court as to how the ward's assets have been used. A conservator is essentially a guardian of property only, and must manage and protect the assets of the ward. A conservator also must account to the court regarding the ward's assets.

Finding a guardian

There is no easy solution for the lack of appropriate guardians for those who may need decision makers. Generally, one tries to recruit a relative, a friend, a former staff member who has taken a special interest in the client, or a volunteer from such organizations as a church group or those associations for retarded citizens that have become "corporate guardians" or operate guardianship projects. Usually the court will tend to avoid appointment of an out-of-state guardian because such a guardian may be deemed too remote to function properly. Where allowed, a foreign guardian must appoint a local agent to receive service of process.

If the ward has sufficient money, a guardian usually can be hired. Often a lawyer or other professional will serve as guardian for a fee. The court can authorize payment for the guardian's expenses out of the ward's funds. These expenses include payment for the time the guardian spends with the ward and can be significant.

Sometimes a volunteer can be recruited more easily to serve as guardian in cases involving temporary guardianship, limited guardianship cases, or a single medical decision. It can be difficult to recruit a volunteer to act on a long-term basis.

A person willing to become the guardian or conservator should be available in court when the petition is filed; otherwise the petition might not be heard.

If no suitable person is available to serve as guardian and the court is being asked to make a decision regarding medical treatment, the court may make the treatment decision and monitor the treatment plan without the appointment of a guardian. The practice in most courts, however, is to appoint an attorney to act as monitor in such cases.

Employees of a caretaking institution should not become guardians of their patients. There is a potential for a conflict of interest between what the ward may need and what the institution may require.

In recent years bills have been introduced to the Massachusetts Legislature that would establish a Public Guardianship Commission. This Commission would provide guardians to indigent persons in cases where no one else was available to serve as guardian. The Commission would be composed of nine members appointed by the Supreme Judicial Court, and would include an elderly person, disabled person, elder advocate, disability advocate, and elder or human services provider.

Before seeking guardianship or conservatorship, it is necessary to assess the individual's capacity to make decisions because a less restrictive alternative may be more appropriate.

Important Matters to Consider Before Petitioning for Guardianship or Conservatorship

Can the person with mental illness or mental retardation make necessary decisions with advice and support from family and friends or other advisors/agencies?

Remember that most of us who live without disabilities routinely ask family and friends for input into important decisions we face. If the person with mental illness has the ability to ask for and listen to (meaning consider and weigh, not necessarily agree with) advice, putting into place an informal mechanism for helping him or her to make important decisions may be sufficient to address his or her needs and avoid a petition for guardianship.

Focus on the person's functional capacity. Consider this from the Uniform Guardianship and Protective Proceedings Act (1997) 8A U.L.A. 170 (Master ed. Supp.2003):

"'Incapacitated person' means an individual who, for reasons other than being a minor, is *unable to receive and evaluate information or make or communicate decisions to such an extent* that the individual lacks the ability to meet essential requirements for physical health, safety, or self-care, even with appropriate technological assistance."

Can the person with mental illness or mental retardation be taught to make better decisions?

There are various training programs for individuals with mental disabilities in areas such as money management, sex education, and independent living skills. Good counseling on particular decisions also may help. Working with the person with the mental disability to retain professionals such as tax preparers, accountants or financial planners may resolve many of the issues or concerns. Again, remember that many adults, including those without a diagnosed mental illness or other mental disability, lack mature life skills and could benefit from additional supports and education but do not require a guardianship.

Is the problem money management?

For strictly financial problems, instead of conservatorship, consider certain kinds of special bank accounts. Also, in some cases the person may be competent to handle small amounts of money for daily purchases but need assistance for larger amounts, saving, or investing.

Joint bank accounts can be created to prevent rash expenditures. To prevent loss, Social Security (including retirement benefits and survivor benefits), Social Security Disability Insurance (SSDI), Supplemental Security Income (SSI), or Veteran's benefit checks can be directly deposited into a bank account by the issuing agency. Arrangements can be made with most banks for a permanent withdrawal order which authorizes the bank to send a certain amount of money on a regular basis to a specified party, such as the landlord or the person with a mental disability for pocket money. The person with mental disability technically retains access to all remaining money in the account, but these procedures may provide enough structure to allow for budgeting and money management.

For individuals with mental disabilities who have access to a substantial amount of money or other valuable assets and who are capable of choosing another person to handle their money, consider helping them create a **trust** or a **durable power of attorney** (see glossary and Part II).

For individuals with mental disabilities receiving benefit checks from Social Security, such as SSI or SSDI, or Veteran's pensions, consider obtaining a **representative payee** to manage these funds (see glossary and Part II).

For individuals with mental disabilities who are too disabled to manage their finances and who have income from sources other than benefit checks, consider **conservatorship** (see glossary and Chapter 1).

A conservator is appointed by a probate court to handle a disabled person's financial decisions, not personal decisions. The court requires evidence of the individual's incompetence to handle financial matters. For example, a person may be so mentally retarded that he or she cannot absorb the information basic to decision making or so mentally ill that he or she bases serious decisions on delusions. For persons with mental retardation, the court also requires evidence of an unreasonable risk to the property if a conservator is not appointed. If the court approves the conservatorship, a certain amount of money can be exempted and left to the individual with the mental disability to handle by himself or herself.

For individuals who presently are capable of making decisions about their health care and wish to anticipate possible future inability to make such decisions, consider a **health care proxy** (see Chapter 5).

For persons with mental disabilities who are incapable of making decisions about both personal and financial affairs, **guardianship** is then an option.

Persons considering guardianship or conservatorship should recognize that the law favors the implementation of the "least restrictive alternative" to address a potential ward's limitations. Always start from the least restrictive possibility to address the needs and limitations of the potential ward, and go from there. Even with the available alternatives to guardianship and conservatorship, nothing can substitute for a forceful advocate on behalf of the person with a mental disability. Every situation is different and it is best to consult an attorney or advocacy agency such as Mental Health Legal Advisors Committee, the Center for Public Representation, or the Disability Law Center (see Part III for contact information).

CHAPTER 1
GUARDIANSHIP AND CONSERVATORSHIP

What is guardianship?

Simply put, guardianship is the mechanism by which one person (or sometimes several persons) has the legal authority to make binding decisions for another person. Guardianship provides the broadest and most controlling form of decision-making help (with conservatorship being the next less restrictive). A guardian is a person appointed by the court to handle both the personal and financial affairs of another person, the "ward."

Before granting a petition for guardianship, the judge must find that the proposed ward is incapable of handling his or her own affairs due to mental retardation, mental illness, inability to communicate as a result of a physical or medical condition, age of minority, or other specific conditions. The authority of the guardian should be, but too often is not, limited to those areas of decision making in which the ward is clearly incompetent. For example, the ward may be capable of making medical decisions for himself or herself, but incapable of making informed choices about a living situation, or the reverse.

In Massachusetts everyone 18 years or older is legally considered competent and able to manage his or her life. Parents are not presumed to be legal guardians and do not have any official decision-making authority over their adult child unless they go to court and are appointed guardians. Thus, a guardian would have to be appointed even for a person with severe mental retardation after he or she reaches the age of 18.

The Massachusetts statute that governs guardianship is found in Chapter 201 of the Massachusetts General Laws. Section 6 sets forth the standard for guardianship over "insane persons and spendthrifts," or persons with mental illness. Section 6 further provides that the court shall appoint a guardian for a person and his estate if it finds after proper notice and a hearing that such person is incapable of taking care of himself by reason of mental illness. The Massachusetts Appeals Court has made clear that, "[t]he inquiry in a proceeding for guardianship pursuant to G.L. c. 201, § 6, is twofold. The petitioners must show not only that the proposed ward is incapable of caring for himself, but also that he is incapable of caring for himself *by reason of mental illness*." Guardianship of Jackson, 61 Mass. App. Ct. 768, 769 (2004) (emphasis added).

The court may require "additional medical or psychological testimony as to the mental condition of the person alleged to be mentally ill and may require him to submit to examination." Mass. General Laws, Chapter 201, Section 6(a).

What is conservatorship?

Conservatorship is a more limited form of control over the ward's affairs than guardianship. A conservator handles only the ward's financial affairs, which allows the ward to make all other personal decisions.

The Guardianship and Conservatorship Process

Who can become a guardian or conservator?

Anyone over 18 whom the court believes will act in the ward's best interests can be appointed a guardian or conservator. Usually the court will look to one or both parents, another relative, a friend, a lawyer, or certain nonprofit corporations. Courts prefer to appoint family members as guardians or conservators unless there are reasons for not doing so, such as potential conflicts of interest. If the proposed guardian or conservator does not reside in Massachusetts, a local resident must be appointed as agent. A durable power of attorney can be used to designate a guardian who is to be appointed by the court if and when a guardianship becomes necessary in the future; the court must honor that designation absent some affirmative basis for disqualification.

What legal standards must be met to obtain guardianship?

Guardianship due to mental illness:

To appoint a guardian for a **person with mental illness**, the court must find that the person is **incapable of taking care of himself or herself due to mental illness**. Mass. General Laws, Chapter 201, Section 6.

Guardianship due to mental retardation:

To appoint a guardian for a **person with mental retardation**, the court must find that: (I) the person is so disabled by mental retardation as to be incapable of making informed decisions about personal and financial affairs; (2) failure to appoint a guardian would create an unreasonable risk to the person's health, welfare and property; and (3) appointing someone with more limited powers (namely a conservator authorized to handle only financial affairs) would not be adequate. Mass. General Laws, Chapter 201, Section 6A.

The first requirement incorporates a clinical standard through which a doctor and psychologist assess the individual, diagnose disabling conditions, and evaluate behavior. The second requirement incorporates a social work type assessment of the person's ability to care for himself or herself and the potential for harm. These factors depend upon the individual's social context, including where he or she lives (home, institution, community program, etc.), who is available to help him or her with decisions and be an advocate, and what are

his or her medical needs. The third requirement incorporates an evaluation of whether any less restrictive alternative is possible, such as a conservatorship or the appointment of a representative payee. Ultimately, a judge decides whether the legal standards for guardianship are met in each case.

Guardianship due to physical incapacity:

To appoint a guardian for a person who is **unable to make or communicate informed decisions due to physical incapacity or illness**, the law appears to require an individualized factual analysis of the proposed ward's circumstances. Mass. General Laws, chapter 201, section 6B. These cases involve accident victims, stroke victims, or comatose individuals. There are few appellate court opinions defining or explaining the scope of this kind of guardianship.

Although the law does not define the standards for guardianship more precisely, before seeking a guardianship, one should consider whether the person can do some of the following:

- understand in simple terms the basic facts and implications of a decision. For example, a medical operation might entail certain risks and discomforts, but still be desirable;

- take care of oneself by recognizing potentially harmful situations and responding appropriately;

- understand and follow the basic laws of the community;

- demonstrate or learn enough basic living skills to live in a group residence or one's own home.

The person need not be able to read or write, or even talk, as long as he or she can communicate effectively his or her needs and preferences. If the person can do the things listed above, a guardianship is probably not appropriate. Instead, consider seeking additional services from agencies like the Department of Mental Health or Department of Mental Retardation, and other agencies listed in the back of this Handbook.

What legal standards must be met to obtain a conservatorship?

The court may appoint a conservator if by reason of "**mental weakness**" the person is "unable to properly care for his property." Mass. General Laws, Chapter 201, Section 16.

Physical incapacity also is a legally sufficient reason to appoint a conservator, provided the person agrees to the appointment. The law does not authorize involuntary conservatorship on the basis of "physical incapacity."

For a **person with mental retardation**, the court must find that: (1) the person "is incapable of making informed decisions with respect to the conduct of his financial affairs"; and (2) "failure to appoint a conservator would create an unreasonable risk to the person's property." Mass. General Laws, Chapter 201, Section 16B. The question of **risk** is crucial; without indication of risk, a court cannot appoint a conservator.

Does the ward have a right to counsel?

When an individual is seeking guardianship, the proposed ward often has no right to counsel, but is permitted to be represented by counsel if he or she can retain one. The ward has a right to counsel only in cases regarding extraordinary medical treatment issues, for example, when the guardian seeks to administer antipsychotic medication or commit the ward to a mental health facility.

The right of a person under guardianship to obtain counsel of his or her choosing to petition for removal or to challenge the guardian's authority has been debated. A guardian may seek to strike the attorney's appearance on the grounds that the ward does not have the capacity to enter into a contract with an attorney. In Guardianship of Zaltman, 65 Mass. App. Ct. 678, 687 (2006), however, the Massachusetts Appeals Court stated that a ward who has previously been adjudged incompetent to make medical decisions should be given the opportunity to demonstrate that he or she is competent to select and retain counsel in order to challenge the guardianship when there is evidence that the interests of the guardian and ward are adverse and that the ward may have recovered his or her competency.

Zaltman called for an evidentiary hearing to be held in such a case to determine if the ward is competent to retain counsel. Counsel must be appointed to assist the ward at this hearing. If the judge at the evidentiary hearing finds that the ward is indeed competent to retain counsel, the ward may hire an attorney of his or her choosing. If the judge finds that the ward is incompetent for this purpose, independent counsel, selected by the judge, will be appointed. The Appeals Court did not say whether the independent counsel will be paid by the Commonwealth.

The decision in Zaltman leaves unclear whether or not an indigent ward must be assigned independent counsel to act on his or her behalf in challenging the guardianship and seeking removal of a guardian. The case may only address those situations in which the ward has retained counsel and the guardian has challenged the ward's competence to do so. In the past, courts have left the appointment of counsel to the judge's discretion. Often, a judge will appoint a

guardian *ad litem* instead of independent counsel to investigate the allegations as in Clark v. Clark, 47 Mass. App. Ct. 737 (1999). Although the law is less than clear, MHLAC staff believes that anyone in this situation who is indigent should consider petitioning the court for counsel pursuant to Zaltman.

What are the standards for guardianship of a person with mental retardation?

Mass. General Laws, Chapter 201, Section 6A provides that the court may appoint a guardian of the person's person and estate if the court finds that the person "is mentally retarded to the degree that he is incapable of making informed decisions with respect to the conduct of his personal and financial affairs, that failure to appoint a guardian would create an unreasonable risk to his health, welfare and property, and that appointment of a conservator . . . would not eliminate such risk. . . ."

The same persons and entities may file the petition as in Section 6 (mental illness), and the same requirements for notice and hearing are set forth in Section 6A as in Section 6.

Under Section 6A, the court cannot find that the person is in need of a guardian unless the petition is accompanied by a "report from a clinical team consisting of a physician, a licensed psychologist and a social worker or certified psychiatric nurse clinical specialist, each of whom is experienced in the evaluation of mentally retarded persons" stating that this team has examined the proposed ward and determined that the individual is mentally retarded and incapable of making informed decisions with respect to the conduct of his or her personal and financial affairs.

When is guardianship appropriate?

In the case of adults, guardianship should be used only for people with serious problems of judgment or extremely limited intellectual capacity due to mental illness or mental retardation, or who are unable to communicate with anyone because of a serious physical condition or illness. Most people with mental illness and mentally retardation do not fall into these categories and should not be placed under guardianship.

Guardianship should be sought only when impaired judgment or capacity prevent understanding of basic information necessary for decision making and pose a major threat to the person's welfare. It is impossible to define precisely what a significant threat to a person's welfare means and it is critical to examine the context of the problem. Remember, for example, a threat may be significant in one set of circumstances and not in another. Persons of limited mental capacity may function adequately in structured living arrangements but not when living alone.

One of the more frequent situations requiring the appointment of a guardian is the need for medical treatment when the person is incapable of understanding the treatment and cannot, therefore, give consent to the treatment. Informed consent of the patient (or guardian) is usually required for all non-emergency surgery and treatment. In life-threatening emergencies, doctors can give treatment without consent, but not over the objection of a competent patient.

A person's living situation and access to advice and help are major considerations in determining whether guardianship is appropriate. For example, one should consider the following:

- How protected is the environment?
- How complex are the decisions that need to be made?
- How much help in decision making can the person get from friends, family, or staff?
- Will the person seek and accept advice and help?

Guardianship should not be used to protect the person from the normal daily risks we all face in working, having a residence, moving about, being consumers, or associating with others. A guardian should not be appointed simply because the person has made or is about to make poor or harmful decisions, has trouble sticking to a decision, or relies heavily on other people for advice. It should only be sought in case of *incapacity*.

When is a conservatorship appropriate?

A conservatorship can be helpful for a person who is capable of making decisions about personal affairs, but who cannot handle financial decisions. However, just as the court should tailor a guardianship, it should also tailor a conservatorship to the potential ward's needs and abilities. There may be instances in which the ward can manage small amounts of money as a regular allowance, but not be competent to make investment decisions with respect to larger amounts, or even manage income without wasting it.

Moreover, for people whose only source of income is benefit checks such as those from Social Security, or Veteran's benefits, and who need help managing this income, a representative payee (see Chapter 4) may provide adequate protection without the more intrusive aspects of conservatorship.

Conservatorship should be considered only for people whose judgment or intellectual capacity is so seriously impaired that they cannot absorb basic information needed for financial decision making. Many people with mental

disabilities are capable of adequately handling their financial affairs (including paying bills on time), either alone or with assistance, and therefore should not be placed under guardianship or conservatorship. The fact that a person is depleting assets which might be needed for support later in life is not a basis for securing a conservator if the person is able to understand the ramifications of the choices he or she is making.

Some sources of assistance include Department of Mental Health (DMH) case managers (if the person is a DMH client), PACT services for DMH clients, other clinical or service providers, and family or friends.

Effects of Guardianship and Conservatorship

How does guardianship affect the daily life of the individual with a mental disability?

The individual under guardianship gains certain protections at the cost of certain rights. Whether the net effect is positive or negative depends on a number of factors including the performance of the guardian and the circumstances that led to the guardianship in the first place.

Unless the court limits the guardianship by spelling out specific parameters of the guardianship, the guardian will have total control of both the personal and financial affairs of the ward, including decisions on education, shelter, medical care, public benefits, legal assistance, debts, and expenditures. The individual under guardianship may lose many civil and legal rights, including the right to make contracts, to choose a place of residence or the type of treatment or educational program, to make major expenditures, to travel at will, to sign benefit checks, and to decide whether to accept or refuse routine medical treatments.

Even while the ward loses such control over many aspects of decision-making, MHLAC staff believes that he or she should still be able to choose who to be friends and associate with and what kinds of leisure activities to enjoy. However, the court may uphold a guardian's decision to limit certain visitors or activities if the guardian can persuade the court that such restrictions are in the best interest of the ward.

How does a conservatorship affect the daily life of the individual with a mental disability?

Under a conservatorship the ward loses the right to sign checks, use credit cards, buy, sell, or mortgage property, sign a lease, sign a contract involving

money, make investments, or make major expenditures. Property, bank accounts, paychecks, Social Security checks, stocks and bonds all "belong" to the ward, but are managed by the conservator (or guardian). These items are held in accounts in the name of conservator as "conservator for" the ward.

The conservator or guardian is responsible for paying the ward's bills and debts out of the ward's funds, and for managing the ward's assets so as to maximize the benefit to the ward.

What are some limitations on the guardian's decision-making powers?

There are a myriad of choices and matters that may come up in the life of an individual under guardianship and some of those matters implicate such fundamental rights that the guardian either cannot make the decisions at all, or must seek court authorization for such decisions.

What a ward can decide for himself or herself:

- MHLAC staff believes that a ward should be able to choose whether or not to marry, but we recognize that while marriage is a fundamental constitutional right, it is also a contract. As such, it is possible that a court could invalidate a marriage involving someone under guardianship if the guardian did not approve and could demonstrate that the ward lacked the requisite mental capacity to enter into the marriage.

- Whether or not to have children.

- Whether or not to vote or participate in civic affairs (but a guardian may be able to challenge capacity to vote).

- With whom to associate.

- Whether to practice a religion.

- What leisure activities to participate in.

What decisions the guardian must seek court approval for:

- Management or sale of the ward's property or assets that are beyond the scope of "day to day" management — for example, selling the ward's house.

- To have extraordinary medical treatment administered to the ward.

- To have the ward admitted to a locked psychiatric facility.

As for medical treatment for the ward, an agency such as the Department of Mental Health, or an institution such as a hospital or other treatment facility, must consult the guardian for consent to services or treatment. The guardian has the right and the responsibility to participate in treatment planning for the ward. It is very important to note, however, that "an adjudication of incompetency under G.L. c. 201, § 6, does not obviate the need for a guardian or a judge to consult the ward's feelings or opinions on a matter concerning his care." Guardianship of Hocker, 439 Mass. 709, 715 (2003); *see also* Guardianship of Zaltman, 65 Mass. App. Ct. 678, 687 (2006) (holding that the judge has an obligation of "personally ascertaining the ward's desires and intentions").

Certain medical decisions are so personal, involve such highly intrusive treatment, or have such profound implications that a guardian in fact is not allowed to make them (see Chapter 2). For example, neither sterilization nor treatment with antipsychotic medication or other extraordinary medical treatment can be authorized by a guardian. Specific court authorization is required, and the court must specifically find, using the substituted judgment standard, that the person, if competent, would consent to the proposed treatment, and the court must specifically approve and authorize an antipsychotic treatment plan in its order, after considering medical testimony. If the court approves a medical treatment plan that includes antipsychotic medication, this is called a *Rogers* guardianship. See Chapter 2 for more information on this type of guardianship.

Similarly, the decision to admit a ward to a mental health or retardation facility requires a special court hearing and cannot be made by a guardian. The ward also must be present and represented by a lawyer. If the ward is indigent, the court will appoint an attorney. If the ward objects to placement in a mental health facility, the guardian can admit the ward only if the court finds beyond a reasonable doubt that the individual is mentally ill, dangerous to himself or herself or others because of the mental illness, and that there is no less restrictive alternative available (the same standard for an involuntary commitment of a competent person).

Where the ward objects to placement in an institution for the mentally retarded, the judicial standard for admission is ambiguous. The standard may be the same standard as stated above. The law again is unclear where the ward agrees with the placement or is unable to state a preference. The court, at a minimum, must find that the placement is in the ward's "best interests." In an emergency, the court can authorize an admission for a short period of time before the ward has an opportunity to be heard.

Responsibilities of a Guardian or Conservator

What are the guardian's responsibilities?

The guardian is responsible for making decisions in the best interests of the ward. The guardian's role is similar to that of a parent. The guardian must remain informed about the ward's needs and make decisions regarding those needs. Unlike a parent, the guardian need not use his or her own money for the ward's expenses, provide daily supervision of the ward, or even live with the ward. However, the guardian must attempt to ensure that the ward is receiving proper care and supervision.

Also, unlike a parent, the guardian should not be concerned about the interests of other family members. Neither the convenience of the guardian nor the welfare of future heirs should factor in the guardian's decisions. A court specifically must give the guardian permission to pursue a course of action on the ward's behalf that is more directed to the welfare of heirs than the ward, such as approving a plan of lifetime giving or a particular type of estate plan. *See* Mass. General Laws, Chapter 201, Section 38.

To remain informed of the ward's needs, the guardian should visit the ward and consult with his or her clinicians and caretakers. When a major decision or problem arises, the guardian should gather information about the situation, the various options, the risks and consequences, and use his or her judgment to determine the best course of action for the ward. The guardian should emphasize to the ward's caregivers that major decisions regarding the ward's care or treatment require the guardian's consent.

A guardian is not expected to be a medical or psychiatric expert, but a responsible and intelligent adult, acting as if facing the issue personally. While the guardian should involve the ward as much as possible to determine the ward's needs and preferences, the guardian must make the final choices.

For a highly unusual and important decision, such as how to manage a large and unexpected inheritance, which was not anticipated at the time of the original guardianship hearing, the guardian should seek court instructions. Certain personal and serious decisions, such as participation in potentially hazardous research studies or experiments, should be made by the court, not by the guardian alone. The guardian initially may find that some judges are reluctant to get involved in this type of decision-making, but the court has a duty to provide guidance.

Decisions involving intrusive or irreversible forms of treatment (which are considered "extraordinary medical treatment"), such as administration of

antipsychotic medication, Electro Convulsive Therapy (ECT or "shock treatment"), sterilization and the withdrawal of life-prolonging treatment, must be made by the court. The court makes a "substituted judgment determination" of what the ward would decide were the ward competent (see Chapter 2).

Unless the guardian's powers have been limited by the court, the guardian is responsible for:

1) the ward's basic needs such as food, shelter, clothing, and education. If the ward lives with the guardian, the responsibilities in these areas would be quite directly involved in day-to-day supervision and provision of funds for daily needs. However, if the ward lives in an institution or community residence the guardian's responsibilities could be limited to regular inquiries as to clothing or incidental needs, participation in the institution's periodic reviews and treatment plans, and decisions on educational plans;

2) the ward's medical needs, authorizing or withholding consent for most non-emergency medical care including tests and surgery. Where the court made a "substituted judgment determination" involving extraordinary medical treatment, it is the guardian's responsibility to act, thereafter, as a monitor of the treatment plan, unless a separate individual has been appointed as a *Rogers* guardian (more accurately called "monitor") to act in conjunction with the general guardian. The guardian should report to the court and seek its approval if the treatment plan must be modified;

3) participating in decisions regarding institutional admission, discharge, and transfer to other facilities. The guardian must be notified of these actions, but does not necessarily have total decision-making authority in these areas. The guardian must act in the ward's best interests and cannot block action which would be more beneficial to the ward than an alternative. Except in the case of an emergency, a facility must notify the guardian of a plan to transfer, and the guardian then has the right to object. *See* Mass. General Laws, Chapter 123, Section 3. The guardian cannot admit the ward to a mental health or mental retardation institution. The guardian must seek special authority from the court as described in Chapter 2;

4) standing in the place of the ward in any legal proceeding in which the ward is a party;

5) settling the ward's accounts and debts using the ward's funds;

6) managing the ward's money and property as carefully[1] as possible and using it for support and maintenance of the ward,[2]

7) applying for any governmental or other benefits or payments (Social Security retirement or survivor benefits, SSDI, SSI, Veterans benefits, Medicaid, Medicare, housing, emergency aid, food stamps or private insurance or annuity) to which the ward may be entitled; and

8) from time to time, re-evaluating the need for guardianship and requesting the court to remove or limit it if it is no longer necessary.

If you are a guardian, remember to consult with the ward before making important decisions for him or her!

What is the role of the conservator?

The conservator must handle the ward's financial affairs in the ward's best interests. The conservator handles only financial matters and the ward retains authority over personal decisions. If the ward wants to purchase a stereo, for example, the conservator must determine if funds permit the expenditure for such an item and if the price is reasonable, but may not decide that a television would be a better purchase than a similarly priced stereo.

In choosing a residence, the ward needs the conservator's involvement. The conservator decides how much can be spent on housing. The ward then can select the location and type of housing that fits within the budgeted amount.

Like guardians, conservators must manage the ward's estate solely for the benefit of the ward rather than for other factors such as the sake of future heirs or the conservator's convenience. With large estates, the conservator can use money partially for support and maintenance of dependent children, a spouse, or parents. However, the first beneficiary must be the ward.

1 Guardians, like trustees, are fiduciaries and generally held to a higher standard of care. It is not a defense that the guardian was equally as careless with his own funds. A "prudent person" standard of care is established by statute for trustees; guardians would be advised to assume they will be held to the same standard.

2 Occasionally, a portion of the ward's estate may be used for needy family members of the ward once the ward's needs are met. However, the guardian must be cautious about making these gifts and should seek advance court approval.

How may a conservatorship be limited?

The court may allow the ward to keep small amounts of money from paychecks, Social Security checks or the like, or other cash assets, to spend as desired. The law allows for up to $300 per month to be exempt from the conservator's control and left to the ward to handle independently. Managing some funds is a way for a person to reach a degree of independence. Typically, this exemption of certain funds from the conservator's control has been granted for people with mental retardation, but could be requested for people with mental illness as well.

What are the responsibilities of the guardian or conservator for the ward's finances?

The guardian or conservator must handle the ward's finances in the best interests of the ward.

Upon appointment the guardian or conservator must review the ward's financial situation. The guardian or conservator should:

1) Obtain several certified or attested copies of the court order from the court since the court order is the only official proof of the guardian or conservator's authority. Hospitals, banks, and other institutions dealing with the guardian or conservator may require certified copies;

2) Take an inventory of the ward's estate, including bank accounts, real estate, valuable personal property, and other sources of income. If the ward is in an institution, the staff should identify funds or property held at the institution. The inventory must be filed with the court;

3) Change bank accounts to "fiduciary accounts" and take reasonable steps to prevent other assets from being dissipated. Fiduciary accounts are identified by writing, the name of the conservator (or guardian), as conservator or guardian of the property of the ward. The ward's money must remain separate from that of the guardian, conservator and other family members of the ward;

4) Notify any agency or company sending benefit payments or other checks, such as the Social Security Administration, of the appointment and instruct the agency where to send the checks;

5) Take possession of any credit cards to prevent misuse and notify any creditors;

6) Settle any debts owed by or to the ward. For example, a lawyer may be hired out of the ward's funds to declare bankruptcy or collect on a debt or pursue a claim. The guardian or conservator is obligated to settle the ward's debts from only the ward's funds;

7) Communicate with the ward and the ward's providers to determine the ward's current, day-to-day, financial needs as well as long-term needs. Priority for expenditure of the ward's funds should be given to necessities such as food, shelter, clothing, education, medical treatment and insurance. If the ward does not live with the guardian or conservator and the ward requires supervision, clear arrangements should be made with the providers as to when and how regularly occurring expenses will be paid and how the guardian or conservator will be notified of unusual needs. The providers should know how to reach the guardian or conservator at all times, including during vacations or extended business trips;

8) If the ward has funds beyond what is necessary to meet basic living expenses, attend to special items that improve the ward's quality of life (such as recreational activities, etc.). Otherwise, the funds should be placed in a savings account, or if substantial, conservatively invested with the help of a lawyer or financial advisor;

9) Be aware of any court-ordered obligations of the ward, such as child support or alimony payments. If the ward has dependents for whom the ward's financial support is required, such as children, spouse, or parents, the guardian or conservator may allot a portion of the ward's money for their support. The conservator (or guardian) should become familiar with government benefits programs in order to know when a benefit may exist that may obviate the need to use the ward's own funds (for example, SSDI dependency benefits for children). The ward's needs should come first and the guardian or conservator should seek court approval before making these types of support payments out of the ward's funds. Also, the possibility of a future need for Medicaid funds for nursing home expenses and the impact of the proposed transfer on qualification for such funds should be taken into account;

10) File an annual accounting of the ward's funds with the appointing probate court. This report protects both the ward and the guardian or conservator. The ward should get a copy of this accounting from the guardian or conservator.

    Guardians or conservators of wards who are residents of facilities of the Departments of Mental Health or Mental Retardation must file annual accounts of the ward's finances with the respective departments as well as with the court. Failure to file such accounts or abuse of the

ward's funds may subject the guardian or conservator to criminal prosecution;

11) Periodically re-evaluate the ward's ability to handle personal or financial affairs, including managing small amounts of money. The ward may learn to make decisions previously made by the guardian or conservator. To act in the best interests of the ward, the guardian or conservator should encourage the ward to act independently whenever appropriate. When the ward can exercise independent judgment in an area, the guardian or conservator should return to court and have the decree revised to reflect the ward's progress. The decree should never be more intrusive than necessary to protect the ward. Some courts require the guardian to file an annual guardianship plan which discusses this issue.

Certain decisions, however, are considered too important for the conservator or guardian to make without special court authorization (*e.g.*, selling real estate, making substantial gifts, or disposing of assets for tax purposes). A lawyer or financial advisor, paid out of the ward's funds, should be consulted on those matters, and in many cases, prior court approval is required.

In addition to making financial decisions, the conservator or guardian is responsible for initiating or responding to any legal actions concerning debts owed to or by the ward. Again, a lawyer should be consulted and may be paid out of the ward's funds. If the ward's estate is large, a lawyer or financial advisor, paid out of the ward's estate, should be hired to give expert investment and tax advice. For estates consisting primarily of a small bank account and a monthly income check, a responsible conservator or guardian should not have difficulty handling the funds.

These guidelines are general and should not be taken as the final word on every individual situation. For most residents in state institutions, the guardian should be able to give competent and legally sufficient services by following these guidelines. For an estate more complicated than a small bank account and a monthly disability check, a lawyer should be consulted.

Whether you are a guardian or a conservator, remember to KEEP RECORDS to show any decisions you make for your ward, and when appropriate, give the ward copies of the records.

Can a guardian or conservator be held personally liable for his or her actions?

In practice, guardians and conservators seldom are held liable for anything except embezzlement or gross misconduct. However, legally they may be liable

for negligence, especially in dealing with the ward's funds. To avoid problems, a guardian or conservator should remain informed of the ward's needs, keep accurate records, make decisions as needed, and act with care in the ward's best interests. A guardian whose ward lives elsewhere should keep informed about his or her ward. The guardian should send a letter to the ward's institution or residence requesting notification of periodic reviews and any unusual changes in health, behavior, and living conditions. A guardian who goes on a long vacation or moves should leave the ward and the ward's providers with contact information and a forwarding address, and tell the ward in advance. One who is frequently elsewhere because of business or other reasons should give serious consideration as to whether such absences prevent the guardian from fulfilling the required responsibilities. When unsure about duties, the guardian should return to the probate court for instructions. Guardians and conservators are not expected to be financial or medical experts; they are expected to act as reasonably responsible and intelligent adults.

Cases in which a guardian could be held liable by a third party typically arise when the guardian has had dealings with third parties on behalf of the ward and has failed to state he or she was acting as guardian.

One common mistake of guardians or conservators is to allow the ward's money to accumulate while the ward's current needs for clothing, housing, community placement or medical care are not met adequately. This mistake occurs most often when the ward lives in an institution or nursing home. The guardian should respond quickly to legitimate requests for funds and should regularly contact the institution or providers and periodically visit the institution to insure that the ward is receiving sufficient care. Cases of abuse, particularly of the elderly, have been uncovered by vigilant family members or guardians. Even if there is no outright abuse, it may be that the patient whose monitor is a "squeaky wheel" will get more attention from a guardian.

Another mistake guardians and conservators frequently make is to divert the ward's money to someone else. The ward's money is for the ward's use, even if the ward appears to be unable to appreciate it. The only exception to this rule is that, with explicit court approval, a portion of the estate can go to the ward's dependent family members. The guardian or conservator may not use the ward's funds for himself or herself or mix the ward's funds with his or her own money. However, the court may authorize a small amount of the ward's money for reasonable expenses and compensation for acting as guardian or conservator.

The guardian cannot be held personally responsible for the ward's debts and does not have to pay the ward's expenses out of the guardian's personal money. The guardian should contest unjustifiable bills and, in extreme situations, consider petitioning on behalf of the ward for bankruptcy. The ward's estate should cover the costs of legal action.

Other Forms of Guardianship

What is temporary guardianship?

Temporary guardianship may be appropriate when an emergency exists and the welfare of the proposed ward requires the "immediate" imposition of a temporary guardian. The period for giving notice to the potential ward and heirs that guardianship is being pursued is reduced drastically or eliminated altogether. Consequently, the ward and/or relative will have greater difficulty contesting the temporary guardianship and preventing the emergency treatment, if any is sought. For this reason, a judge is likely to require greater evidence of both incompetence and the existence of an emergency. Unlike many permanent guardianships which do not have expiration dates, temporary guardianships can last ninety (90) days and may be renewed for additional periods of ninety days.

Temporary guardianship is also used when no one is willing to serve as a permanent guardian, and a decision, such as a decision regarding medical treatment, must be made quickly. The theory is that volunteers are easier to find for the shorter time period. Note that treatment decisions involving extraordinary medical treatment may not be made by a temporary guardian—this requires the appointment of a *Rogers* monitor (see Chapter 2). *Note also that a petition for temporary guardianship must be accompanied by an underlying petition for permanent guardianship*. The petition for permanent guardianship may then be withdrawn if the purpose of the guardianship has been accomplished during the temporary period.

What is a limited guardianship?

A limited guardianship is a form of guardianship in which the guardian's role is restricted to those areas where the ward is clearly incompetent and the ward retains the authority to make decisions in other areas. For example, guardianships may be limited to important medical decisions or the court may permit the ward to retain some money without guardian approval. These limitations are important mechanisms that help tailor guardianship decrees to meet the special needs of the ward in the least restrictive manner.

What is a guardian ad litem?

A guardian *ad litem* (which means "for the litigation") is different from the kind of guardian that has been previously discussed in this Handbook. The court uses guardians *ad litem* to perform a variety of functions in different kinds of cases. The court may appoint a guardian *ad litem* to serve as an independent investigator, reviewing facts and reporting to the judge on such issues as the need for a guardian or the suitability of a particular guardian. In some cases, the court may appoint the guardian *ad litem* to act as an advocate for an incompetent

adult or a minor child. The guardian *ad litem* does not have the power to make personal or financial decisions for the ward. Once the legal case is completed, the guardian *ad litem's* duties cease.

Can someone have two co-guardians?

A guardianship may be established for an incompetent with two persons acting jointly as co-guardians. They either can be two individuals or one individual and a financial institution possessing trust powers. Normally such an arrangement requires joint decision and action by both co-guardians unless the court has otherwise provided. Where an individual and a financial institution are serving together, it is common for the individual to handle personal matters and the financial institution to handle the estate. Co-guardians can be a way of permitting siblings to be assured of a say in the care of an elderly parent or a third sibling. The dual appointment can be a way to ensure continuity where the logical initial guardian is also elderly or infirm. While co-guardianship may add either complexity or cost (or both) to a guardianship, it usually provides some off-setting stability that one guardian would not provide. Also, it allows for a flexible arrangement for a division of responsibilities.

If co-guardians disagree about decisions for the ward, the court may have to intervene unless the co-guardians can resolve the matter on their own. One possibility is to determine ahead of time that in the event of a disagreement, one of the co-guardians will be able to make the final decision, even over the objection of the other. If such an agreement is made, these terms should be written into the decree.

Co-guardianship for a minor child cannot exist between a parent of the child and a non-parent absent a finding that the parent is unfit, or an agreement by the parent to share parenting decisions with a non-parent. See also "What is guardianship of a minor?" below.

Can a corporation be a guardian?

A corporation can be a guardian, but this is more likely to occur when there are substantial assets to be managed (see above question). There would be fees associated with this type of guardianship which typically would not be the case where a family member is guardian. Corporate guardians sometimes act as the sole guardian for adults or minors who are incompetent. In such cases, typically a particular trust officer will be assigned and maintain the same function for a number of years.

Guardianship issues relating to Children

Although parents are presumed legal guardians of their children until age 18, when necessary, another guardian may be appointed for a minor whose parent or parents are not fit to care for the child (this is a guardianship of a minor—see below). In such a case, the court then may nominate and appoint a guardian. A minor over 14 may nominate, subject to court approval, his or her own guardian

What is guardianship of a minor?

A guardianship of a minor may be sought by a non-parent relative or friend when one or both parents are unable to properly care for the child. The parents of the minor must be adjudicated unfit by a judge in Probate & Family Court, or the parents may simply agree to the guardianship. The person seeking the guardianship of the minor files a petition in Probate & Family Court, and usually seeks a temporary guardianship as well so that immediate issues such as school or medical care for the child may be addressed. A guardianship of a minor, even if it becomes "permanent," is not the same as a termination of parental rights. Once the parent believes he or she is fit to parent, he or she can petition the court for a termination of the guardianship by showing evidence of a substantial change in circumstances evidencing current fitness, and that the best interests of the child warrant being returned to the custody of the parent.

Can a parent designate in a will someone as a guardian for a child?

A parent may state preferences for a guardian in a will and the court will appoint the guardian after he or she files a bond. However, the parent's designation is not binding and the court can overrule it if the proposed guardian is unfit. For those who are concerned about the well-being of their children if they should die or become incapacitated, see the next question on standby guardianship.

What is standby guardianship of a minor?

Parents or persons with custody of minor children may during their lifetimes nominate persons to commence to act as temporary guardians of their minor children immediately upon the event of their death or incapacity. This "standby" guardian is also referred to as a "proxy", because his or her guardianship is limited to 90 days, at which time he or she must file (or find someone else to file) a petition for the appointment of a permanent guardian for the minor. The proxy is named while the parent is still able to parent, but "standing by" in the event of death or incapacity. The proxy can be given guardianship of the minor's person, estate, or both, depending on the specification of the document created by the parents. The probate court has forms which should be used to establish a standby guardianship. The document is executed with the same degree of formality as a

will, with two or more people serving as witnesses to its signing and the petition must then be filed with the court.

Some parents with progressive illnesses have found this kind of guardianship planning to be helpful. In the past, a parent who had no successor co-parent for his or her child was often left with undesirable alternatives. He or she could surrender the child for adoption or seek to have another guardian or co-guardian appointed, but these processes could cause the parent to give up the present guardianship status. The parent could also designate a guardian in a will, but, as discussed previously, it may not be binding on the court and, in any case, the proceedings take place after the death of the parent. Standby guardianship protects parental rights while the parent is still alive, and provides a legally-binding guardian (proxy) immediately upon the parent's death or finding of incapacity.

The standby guardianship statute also gives parents or persons with custody of minors the ability to appoint a short-term emergency proxy. This appointment differs from that of the normal standby guardianship in a few ways. It may be done without court approval provided that the document is signed by the parents and proxy and meets the formal witness requirements. The emergency proxy has the authority to act as a guardian for a period of 60 days, unless the document states a shorter period of time, and they are given guardianship of the minor's person, but not his or her estate. Also, unless the document states otherwise, the appointment of an emergency proxy goes into effect immediately upon execution of the document. These provisions, however, still protect the parents' rights. Every appointment of an emergency proxy may be amended or revoked at any time by the appointing parent or parents. By consenting to an emergency proxy's authority, a parent does not necessarily give up his or her parental or guardianship rights, but creates a situation of concurrent authority.

Are there other alternatives to guardianship of a minor?

There has been proposed legislation, commonly referred to as "Kinship Care Reform," which would provide for family members to make agreements in situations where a relative has assumed a parental role for a minor. This situation is becoming more frequent as more grandparents, for example, assume a parental role for their grandchildren for various reasons, including the parent's inability to care for the child. It is anticipated that, if passed, such legislation would allow parents to authorize another caregiver to make day-to-day medical and educational decisions for their child, without court intervention and without relinquishing any parental rights. At the time of publication, no such proposal has passed into law.

Other issues

A minor's earnings are not the parent's or the guardian's to dispose of except for the expenses of and benefit of the minor. The guardian will need to

file periodic accountings showing such funds to have been properly dealt with. Although the guardianship of a minor typically extends until the minor reaches age 18, there is some tendency in the courts to require periodic hearings to make sure the guardianship really needs to continue that long. A parent, grandparent, other relative, or close friend may desire to transfer funds to be made available to a minor for either current or future needs, but without the expense of a guardianship proceeding. Apart from trusts (discussed in Chapter 3) other methods of transfer, such as the Uniform Gifts to Minors Act, are available. As significant tax consequences may result, it would be wise to seek advice from a qualified accountant or tax attorney.

Substituted judgment decisions differ somewhat from those for an adult and should take into account all aspects of the minor's status, age, mental capacity, and parental involvement.

Planning for the Future

Can an individual name someone to be appointed guardian or conservator in the event that he or she should become incapacitated in the future?

An individual can give someone the power to act in a manner similar to a legal guardian should he or she become incompetent in the future. The Uniform Durable Power of Attorney Act, Mass. General Laws, chapter 201B, permits an individual to appoint a person to handle his or her financial affairs and the Health Care Proxy Law, Mass. General Laws, chapter 201D, permits an individual to designate a person to make health care decisions on her behalf. See Chapter 5 for more information. The guardianship law also provides that a parent may appoint a standby guardian for minor children to take effect upon incompetence of the parent. Such an appointment must be executed with the same formality as a will.

Can a will be made by or for someone who is under guardianship?

A will can certainly be made for the benefit of a ward, and perhaps by the ward. A person under guardianship is not automatically prohibited from writing a will. The person must be capable of understanding what he or she is doing when writing a will. He or she must be capable of understanding the significance of making an arrangement to dispose of property after death and must understand the arrangements being made in the document.

Almost certainly the equivalent of a will may be made for a person under guardianship. If there are substantial differences between the proposed will and

what the law would provide absent a will, the more cumbersome route of preparing a plan for disposition of the ward's estate suggested below ought to be taken. The reason is that, for a person under guardianship, there may be a presumption that the person is not competent to make a will and there is a chance this issue may be raised after the ward's death at which time the alternative method described below will not be available.

Therefore, the guardian may want to prepare a plan for disposition of the person's estate. To the extent possible, the plan should take into account any intentions or desires the ward is able to express. This is not a will *per se*, but it does provide for disposition of property after death. It also can be used for disposition of the estate before death by way of large gifts or the creation of Medicaid qualifying trusts. The plan must be approved by the probate court. See Mass. General Laws, Chapter 201, Section 38. Seek advice from an attorney regarding this procedure.

CHAPTER 2
OTHER GUARDIANSHIP ISSUES: EXTRAORDINARY MEDICAL TREATMENT DECISIONS AND AUTHORITY TO ADMIT TO A MENTAL HEALTH OR RETARDATION FACILITY

Today, the decisions guardians may have to make on behalf of their wards involve complex medical and ethical issues such as the administration of antipsychotic medication, the withdrawal of life-prolonging treatment, psychosurgery, electroconvulsive therapy, sterilization, and admission to a mental health or mental retardation facility.

The Massachusetts Supreme Judicial Court (SJC) has established standards to be followed in such cases and as a result, the scope of the guardian's power has been limited. Judges are required to become decision-makers in matters involving extraordinary or intrusive medical treatment and admission to a mental health or mental retardation facility.

When must the guardian seek court approval for medical care decisions for the ward?

As a general rule, the guardian is allowed to make *routine* medical care decisions on behalf of his or her ward. When the proposed medical care (which could be either giving treatment or withholding treatment) goes beyond the routine, the guardian must seek court approval for the treatment and get a court order specifically authorizing said treatment before it can be administered to or withheld from the ward.

The SJC has identified a variety of factors to be taken into account when deciding whether a guardian must get a court order authorizing the provision of or withholding of medical treatment for a ward. These factors include:

- the extent of the impairment of the ward's mental faculties;
- whether the ward is in the custody of a state institution;
- the prognosis without the proposed treatment;
- the prognosis with the proposed treatment;
- the complexity, risk and novelty of the proposed treatment;
- the possible side effects of the treatment;

- the ward's level of understanding and probable reaction;
- the urgency of decision;
- the consent of the ward, spouse, or guardian;
- the good faith of those who participate in the decision;
- the clarity of the professional opinion as to what is good medical practice;
- the interests of third persons; and
- the administrative requirements of any institution involved.

The SJC did not decide "what combination of circumstances makes prior court approval necessary or desirable." *See* Matter of Spring, 380 Mass. 629, 637, 405 N.E. 2d 115, 121 (1980). Therefore, the foregoing list is not a checklist *per se*, but rather a guide to what the guardian must consider prior to seeking court authorization for medical treatment for the ward.

How does the court make medical treatment decisions?

The court uses a two-part process to make decisions regarding extraordinary medical treatment. The first part is a determination of competence, and the second part is a substituted judgment determination.

First, the court must determine whether the individual is legally competent to make the specific treatment decision, using the previously mentioned guardianship standards (see Chapter 1). A person is presumed to be capable of handling his or her affairs unless the evidence proves otherwise. Furthermore, just because someone has been involuntarily committed to a hospital does not mean that he or she is not competent to consent to or refuse treatment. The Massachusetts Supreme Judicial Court (SJC) recognized:

> a general right in all persons to refuse medical treatment in appropriate circumstances. The recognition of that right must extend to the case of an incompetent, as well as a competent, patient because the value of human dignity extends to both.

Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 745, 370 N.E.2d 417, 427 (1977).

If the judge finds the individual competent to make the treatment decision, the individual may do so. If the judge finds the individual incompetent to make the

treatment decision, the court will move to the second step in the process which is the "substituted judgment" determination.

In this second step, the court must substitute its judgment for the incompetent person and determine, with as much accuracy as possible, the desires and needs of that person. The court must determine what that specific person would do in the situation at hand if that person were competent. It does not matter if that person's decision would be foolish, unwise, or not followed by the majority of people. The process is subjective in nature and specific to the individual. A well drafted health care proxy that addresses these desires would be allowed as evidence in a hearing on medical treatment decisions (see Chapter 5 for a discussion of Health Care Proxies and for sample Health Care Proxies).

In making a substituted judgment determination, the court must consider a number of important factors:

- the ward's expressed preferences regarding treatment;
- the ward's religious convictions;
- the impact of the ward's decision on the ward's family;
- the possibility of adverse side effects;
- the prognosis without the proposed treatment; and
- the prognosis with the proposed treatment.

Can a guardian authorize antipsychotic medication to a ward?[1]

No, only a **judge** can approve the administration of antipsychotic medication to an incompetent individual. Court involvement is required whether the individual is hospitalized or living independently.

In Rogers v. Commissioner of Dept. Mental Health, 390 Mass. 489, 458 N.E. 2d 308 (1983), the Massachusetts Supreme Judicial Court affirmed the right of an institutionalized person to refuse antipsychotic medication in a non-emergency situation. The court found that the administration of antipsychotic medication is a particularly intrusive form of treatment which carries the risk of

1 Antipsychotic drugs are "medications such as Thorazine, Mellaril, Prolixin, and Haldol that are used in treating psychoses, particularly schizophrenia." Rogers v. Okin, 634 F.2d 650, 653 n.1 (1st Cir. 1980). Since this case, however, other antipsychotic drugs having different characteristics have become available and treatment authorization is required for them as well. The older drugs are often referred to as "typical" antipsychotics and the newer drugs often are referred to as "atypical" antipsychotics.

serious side effects. It concluded that a decision to consent to such treatment could not be left to a guardian.

Before any antipsychotic medication may be given to an individual under guardianship, a *Rogers* hearing (named after the case described above) must take place. The individual is entitled to court-appointed counsel for this proceeding (see "*Does the ward have a right to counsel?*" in Chapter 1 for further discussion).

At the *Rogers* hearing, a judge considers a treatment plan submitted by the individual's treating physician or psychiatrist. The treatment plan should state what antipsychotic medications are being proposed, their dosage and method of administration, and their potential risks, benefits, and side effects. The judge considers whether or not the proposed medication is in the individual's best interest and employs "substituted judgment" (as discussed above in the previous question).

If the judge in a *Rogers* hearing approves the treatment plan, he or she will appoint a "*Rogers* monitor" (sometimes called a *Rogers* guardian). The role of the *Rogers* monitor is to make sure the substituted judgment treatment plan is followed, to report to the court (the treatment plan must be reviewed at least annually), and to seek court guidance any time either party seeks to modify the plan. In cases where a suitable monitor cannot be identified, the appointing judge may act in the role of the monitor. The practice in most courts, however, is to appoint an attorney as the monitor in such cases.

It should be noted that the substituted judgment requirement applies even in situations where an incompetent person agrees to treatment with antipsychotic medication. The reason is that an incompetent person is considered unable to give "informed" consent, and a judge must make a substituted judgment determination any time a person is unable to give informed consent to proposed treatment with antipsychotic medication.

Can a guardian authorize sterilization of the ward?

No. The guardian of an incompetent person cannot consent to the sterilization of a ward without proper judicial authorization. A substituted judgment determination must be made by a probate court before a guardian can give consent to this procedure. The judge must apply the same substituted judgment factors described in the medical treatment case (see above) and consider the ward's preference regarding other means of contraception and parenthood.

Can a guardian refuse to consent to medical treatment that would prolong the life of the ward?

No. A guardian must seek court approval before refusing to consent to life-prolonging medical treatment for a ward. The court makes a substituted judgment determination, and in doing so the court must balance the individual's desires against potentially conflicting state interests, including: (1) the preservation of life; (2) the protection of the interests of innocent third parties such as children; (3) the prevention of suicide; and (4) maintaining the ethical integrity of the medical profession. Superintendent of Belchertown State School v. Saikewicz, 373 Mass 728, 370 N.E.2d 417 (1977).

This question can become extremely complex and the guardian should seek knowledgeable legal advice.

Can a guardian admit a ward to a mental health or mental retardation facility?

No. Decisions regarding admitting a ward to a mental health or retardation facility require a special court hearing and cannot be made by a guardian alone. The ward must be present and represented by a lawyer. If the ward is indigent, the court will appoint him or her an attorney. If the ward objects to placement in a mental health facility, the guardian can admit the ward only if the court finds beyond a reasonable doubt that the individual is mentally ill, dangerous to self or others, and that there is no less restrictive alternative available. If the ward objects to placement in a facility for the mentally retarded, the judicial standard for admission is ambiguous. The standard may be the same standard as stated above. The law again is unclear when the ward agrees with the placement or is unable to state a preference. The court, at a minimum, must find that the placement is in the ward's "best interests." In an emergency, the court can authorize an admission for a short period of time without the ward having an opportunity to be heard.

PART II
ALTERNATIVES TO GUARDIANSHIP AND CONSERVATORSHIP

Guardianships and conservatorships may be appropriate under some circumstances; however, a less restrictive alternative is often more appropriate. There are varying degrees of mental capacity and ability, and any limitation on a person's autonomy should seek to meet the needs of the individual while at the same time maximize the person's rights and liberties.

As discussed in the previous chapters, some of the problems inherent to guardianships and conservatorships are the costs involved, the need to account to the court, the need for court instruction on many questions, and, of course, the fact that they may overly constrict the ward's rights and liberties. Below we briefly present some informal alternatives. The next three chapters will discuss other, more formal, less restrictive alternatives including trusts, durable power of attorneys, representative payees, and health care proxies.

Informal Alternatives

In order to preserve maximum autonomy for the individual in question, consider two unobtrusive options. If the individual that you are concerned about shows minimal difficulty making reasoned medical or financial decisions, monitoring and assistance by someone close to them (especially a trusted family member) may resolve the problem.

For financial assistance, consider a **joint bank account**. Perhaps the individual can (or could learn to) write checks and make purchases on his or her own with help maintaining a safe balance and making rational spending decisions. Amending the terms of an individual's bank account also may protect the finances from others.

For medical care support, consider getting a **release and authorization** for medical information. This is a form that the individual signs to allow a concerned party to speak directly with his or her specified health care provider. A release and authorization preserves the right of the individual to make personal medical decisions in consultation with his or her clinician, (no one else has a say in the health care to be provided), but allows the concerned party to stay informed about the individual's health care treatment with that individual's express permission. (The release cannot be vague, but must state a specific provider and what medical information may be disclosed.)

CHAPTER 3
TRUSTS AND POWERS OF ATTORNEY

Trusts

What is a trust, generally?

A trust is a legal plan for placing funds and other assets in the control of a trustee to benefit an individual. The trustee may be an individual or an organization such as a bank, and sometimes the two can serve jointly as co-trustees. The trust provides a financial plan for protecting assets and benefiting the individual and can provide for the trust's disposition upon the death of the individual. If a suitable trustee is chosen, the trust also provides a good advocate who can protect the individual's civil and legal rights.

Trusts for the benefit of persons with disabilities should be established with the help of a lawyer experienced in wills and trusts and familiar with the law relating to both government disability benefits and institutional care. Knowledge of these laws is important for two reasons:

1) If a person's assets exceed a certain amount, a state institution may charge a person for institutional care or the person may not qualify for certain benefits. Therefore, serious consideration should be given to how and whether assets should be conveyed to the person with a disability or placed in trust and the nature of the trust.

2) Certain public assistance programs, particularly Supplemental Security Income (SSI) and Medicaid, are based on an individual's income and assets. If a trust is not properly set up with these kinds of benefits in mind, an individual may face a reduction or termination of benefits. In many cases, these benefits can be important sources of support for an individual.

What is a "Special Needs Trust"?

A **Special (or Supplemental) Needs Trust** (SNT) may be a useful tool for individuals receiving public benefits or disability benefits. For a special needs trust not to be counted as income for the purpose of eligibility for continued government benefits, the special needs trust: 1) must be for the sole benefit of the person with the disability but managed by someone else — a trustee; and 2) there can be no direct payments to the beneficiary. (There may be other requirements as well — see an experienced trust and estates attorney for further information on setting up a SNT.)

There are some distributions made from the special needs trust that will not reduce the amount of the individual's public benefits including payment for attendant care, dental care and eyeglasses, educational and vocational training expenses, recreational expenses, medical expenses not otherwise paid for by government program, transportation (including vehicle purchase), and expenses for a telephone. Money from the trust cannot fund expenses for food, shelter, and clothing (which is presumed to be funded from government benefits), but can be used to fund supplemental needs, and items that add pleasure to a person's life, such as furniture or a television.

Power of Attorney

What is a power of attorney?

A power of attorney is an agreement that grants one person the legal authority to handle the financial affairs of another person. The person designating another individual to handle his or her affairs is the "principal." The person designated to handle the affairs is the "attorney-in-fact." The attorney-in-fact is not necessarily an attorney by profession, and is often a member of the principal's family.

A power of attorney may be general, giving the attorney-in-fact the authority to act for the principal in all financial situations, or it may be limited. A limited power of attorney gives the attorney-in-fact only the rights listed in the document. For example, the principal may authorize his or her attorney-in-fact to sign a particular legal document while out of town.

A power of attorney also may be set up to be durable or non-durable (also referred to as a general power of attorney). This designation determines, upon the principal's incapacity, the authority of the attorney-in-fact. See the following questions for a discussion of durable and general powers of attorney.

The creation of the power of attorney does not require court action. It should, however, be witnessed by a person or persons who are not named in the document and notarized.

Who may execute a valid power of attorney?

In order for the agreement to be valid, the principal must be competent at the time of execution (*i.e.* creation) of the power of attorney. This standard generally refers to the principal's competence to enter into a contract, which involves not just comprehension of what is going on generally, but also the ability to comprehend the nature of the agreement and its significance and consequences. If a person with a mental disability has periods of competence and incompetence, he or she may set up a power of attorney as long as he or she is competent at the time of execution.

How long does a power of attorney last?

A power of attorney can be written to go into effect immediately upon execution or at a later date. The power of attorney then may end in a few ways. First, the agreement ends with the death of the principal. Second, the principal may revoke the power or attorney at any time. Finally, unless specifically set up to do so, a general power of attorney agreement will not remain valid once the principal is considered incapacitated because of mental illness or disability.

What is a durable power of attorney?

Unlike a general power of attorney, a durable power of attorney survives the incapacity of the principal. According to the Uniform Durable Power of Attorney Act (which is a federal law), in order to be durable, the document must contain the words: “This power of attorney shall not be affected by subsequent disability or incapacity of the principal”; or: “This power of attorney shall become effective upon the disability or incapacity of the principal”; or similar words showing the intent of the principal to have the power of attorney survive his or her incapacity.

When can a durable power of attorney go into effect?

A durable power of attorney becomes effective upon execution unless it is set up to be “springing,” in which case it “springs” into effect upon appropriate medical certification of the principal’s incapacity. To be valid, the designation that the power of attorney is a springing one must be in writing and must clearly communicate that intention. Court action is not required. The document should identify the family doctor of the principal as the person to certify to the attorney-in-fact that incompetence had occurred.

Can the attorney-in-fact make health care decisions for the principal?

No. Prior to the end of 1990, many Massachusetts attorneys wrote durable powers of attorney which contained language giving the attorney-in-fact the authority to make health care decisions for the principal, and many doctors and medical care facilities permitted the attorney-in-fact to consent to medical treatment for the incompetent principal. But on December 19, 1990, the Massachusetts legislature created the Health Care Proxy Law which made clear that a health care proxy is the only method for choosing an alternative medical decision maker after this date. **A durable power of attorney can no longer be used to make medical decisions.** Therefore, often it is a good idea for both a power of attorney and a health care proxy to be in place. Just as with one’s will, it is advisable to review these documents periodically to make sure they are up to date.

How do the responsibilities of an attorney-in-fact differ from those of a guardian?

Typically the holder of the power of attorney would not be required, as a guardian would, to provide some sort of surety bond. This feature is both a cost saving one and one which removes a degree of protection built into the guardianship relation. Also, unlike guardians, attorneys-in-fact are not required to file periodic financial reports with the court. They also allow for more creativity in giving authority over only specific assets or transactions, by using limited or special powers of attorney.

What are the advantages and disadvantages to a power of attorney?

A power of attorney is a simple, straightforward way to give authority to an agent. It can help families avoid the resources and time associated with the formal court proceedings of obtaining guardianship. Also, if the document contains the "durable" or "springing" language, it can be a useful tool in planning for future incompetence.

The lack of court involvement can, however, prove to be a disadvantage in some cases. Because the actions of the agent are not subject to court supervision, there may be more opportunities for abuse of authority. Thus, an attorney-in-fact should be chosen carefully. Another disadvantage of the relative informality of a power of attorney agreement is that certain third parties may choose not to recognize the agreement. Many banks, for example, may not accept the designation and may require the use of special bank forms.

CHAPTER 4
REPRESENTATIVE PAYEES

What is a representative payee?

A representative payee (sometimes called a "rep payee") is a person or organization authorized by the Social Security Administration (SSA) to cash and manage certain benefits checks, such as Supplemental Security Income (SSI) and Social Security Disability Insurance (SSDI), for a person deemed unable to do so. Federal regulations set out when the SSA will appoint a representative payee, and define the payee's responsibilities.

The representative payee only has authority over income from the particular source of income for which he or she is the payee. For example, a payee for SSI checks cannot control a recipient's bank account if it contains funds from sources other than SSI, or even if it contains SSI funds received prior to the appointment as representative payee.

A representative payee cannot make personal decisions on behalf of the person with a disability, and cannot make financial decisions about personal property or real estate that the recipient owns. The powers of a representative payee are thus more restricted than those of a guardian or conservator, and most powers of attorney. (Note that the Social Security Administration does not recognize a power of attorney for SSA benefits, and a representative payee is the only mechanism by which someone other than the recipient can cash and manage the benefits.)

When is a representative payee appointed?

SSA policy states that all recipients have the right to manage their own payments. However, the local SSA office will appoint a representative payee if it determines that you cannot manage, or direct someone to manage, benefit payments in your own interest. A representative payee will be appointed if you are:

- legally incompetent (as determined by a court);
- mentally incapable of managing benefit payments;
- physically incapable of managing, or directing someone to manage benefit payments; or
- under age 18, unless you are applying for SSI or SSDI within seven months of turning 18, or you live on your own and have shown that you can manage the benefits.

SSA will look at court findings on competence, medical evidence, and statements of family, friends, or service providers to decide if you are capable of managing your funds.

The SSA may also require a representative payee for a person who has a substance abuse condition, but has been found independently disabled. Like other cases in which Social Security decides to appoint a representative payee, the person may appeal that decision.

How is a representative payee selected?

An individual must apply to the SSA to be a representative payee. The SSA will decide who the representative payee will be.

In selecting a representative payee, SSA will consider:

- the recipient's relationship to the potential representative payee, if any;
- the amount of interest that the potential representative payee shows in the recipient;
- any legal authority the potential representative payee has to act on the recipient's behalf;
- whether the potential representative payee has custody of the recipient; and
- whether the potential representative payee is likely to know and look after the recipient's needs.

If the recipient is over age 18 and has not been determined to need a payee on the basis of having a substance abuse condition, preference is given, in this order, to:

- a legal guardian, spouse or other close relative the recipient lives with, who has custody over the recipient, or who demonstrates a strong concern for the recipient's welfare;
- a friend the recipient lives with or who demonstrates strong concern for his or her welfare;
- a public or nonprofit agency or institution (such as a nursing home or psychiatric hospital) which has custody of the recipient (for a fee, paid by the recipient);

- a private, profit-making institution, licensed under State law, which has custody of the recipient (the institution may keep a large portion of the benefit check to pay the recipient's expenses);

- persons other than those listed above who are willing and able to serve as representative payee, *e.g.*, members of community groups or organizations.

The order of preference, however, is flexible to accommodate the SSA's desire to select the payee who will best serve your interests.

The SSA must investigate and approve each applicant seeking to serve as representative payee. The SSA must keep a list of all representative payees, and be sure that certifying a particular person "is in the interest of" the recipient. Whenever practicable, a face-to-face interview must take place. The SSA must:

- obtain proof of the person's identity;

- verify the nominated payee's Social Security number or employer identification number;

- find out if the nominated payee is disqualified because he or she has been convicted of a "Social Security felony" or for another reason;

- find out if the nominated payee has ever misused another recipient's funds;

- verify the payee applicant's employment and or direct receipt of Title II, VIII, or XVI benefits;

- verify the payee applicant's concern for the beneficiary with the beneficiary's custodian or other interested person;

- require the payee applicant to prove a relationship to the beneficiary and also describe his or her responsibility for the care of the beneficiary; and

- determine whether the payee applicant is a creditor of the beneficiary.

After a representative payee has been selected, the SSA may, at any time, ask the payee to provide information showing that the payee's relationship with the recipient continues, and that the payee is not mishandling the money. If the representative payee fails to respond within a reasonable time, the SSA may stop payments to the representative payee or may select another person to serve as payee. The SSA will consider paying the recipient directly if it decides to stop

sending the payments to the representative payee. At the same time, SSA will look for a new payee.

If the SSA does not follow procedures to investigate and monitor the representative payee, and the payee misuses the recipient's funds, the SSA may be liable to the recipient for the misused funds, and may have to pay him or her back.

Who may not serve as a representative payee?

Certain people who may not serve as representative payees include:

- persons convicted of a violation of the Social Security Act;
- persons who have received Social Security benefits through a representative payee; and
- people who have previously served as representative payees and misused Social Security benefits. However, if SSA decides to allow a previously served representative payee who has misused SSA benefits to be a representative payee again, then SSA must evaluate the representative payee's performance at least every three (3) months until SSA is convinced that the representative payee poses no risk to the beneficiary's best interest. SSA may make exceptions on a case-by-case basis if all of the following are true:
  - ♦ situations where it is not in the best interest of the beneficiary to make direct payment of benefits to the beneficiary;
  - ♦ a suitable alternative representative payee is not available;
  - ♦ it would be in the best interest of the beneficiary to select the representative payee applicant;
  - ♦ the SSA has information that indicates the applicant is now suitable to serve as a representative payee; and
  - ♦ the applicant has either repaid the misused benefits, or has a plan to repay them.
- Normally a creditor (a person who provides another with goods or services for consideration) may not serve as a representative payee. However, if a creditor does not pose a risk to the beneficiary and his/her financial relationship with the beneficiary presents no substantial conflict of interest, the creditor may serve as a representative payee if he or she also is:

- ♦ related to the beneficiary and living in his or her household; or
- ♦ the legal guardian or representative of the beneficiary; or
- ♦ a licensed or certified care facility; or
- ♦ a qualified organization which has incurred expenses by providing the beneficiary with a representative payee and therefore authorized to collect a monthly fee; or
- ♦ an employee, administrator, or owner of a licensed or certified care facility in which the beneficiary lives, only if Social Security has been unable to find an alternative representative payee.

What are the duties of a representative payee?

Once appointed and certified, the representative payee must determine from the beneficiary what he or she needs. The benefit checks will be sent to the payee, who will endorse and deposit them in a separate bank account for the beneficiary. The payee should make payments on the beneficiary's behalf from this account. The representative payee should keep accurate records and retain all bills, receipts and canceled checks. If the beneficiary receives SSI, the representative payee must make sure that his or her savings do not exceed the $2000 limit for an individual or $3000 for a member of a married couple. Savings in excess of these limits could make the beneficiary ineligible for SSI.

A representative payee must spend SSI and SSDI funds only for the benefit of the recipient. The representative payee must act in the beneficiary's ***best interest***, taking into account his or her individual requirements and particular circumstances.

The spending priorities are:

- items for basic maintenance (food, clothing, shelter, utilities, personal care, medical and dental care, education, personal comfort items, etc.);
- reasonably foreseeable needs (rehabilitation services, expenses for transfer, etc.);
- basic subsistence costs for any legal dependents which are not paid by other sources (AFDC, Social Security, etc.);
- saving and investing; and

- payment of debts. (Please note: SSI and SSDI kept separately from other funds cannot be taken by creditors to pay debts, except paying the SSA back for overpayments and Internal Revenue Service levies for the collection of unpaid federal taxes. Only SSDI funds can be garnished for the enforcement of child support and/or alimony obligations. A recipient of SSI may have to pay a child support obligation, but it cannot be garnished by the Department of Revenue.)

Medical expenses also should be paid, but only what is not covered by other sources such as Medicaid, Medicare or the free care pool. If the beneficiary is on SSI and in an institution that does not accept Medicaid, the representative payee should prioritize basic needs and items that will aid in the beneficiary's recovery or release, as well as provide money to improve his or her general condition, such as canteen money. If the institution accepts Medicaid, then Medicaid should pay the institution's costs, and SSI may only be used for personal needs.

If the beneficiary is in an institution, the representative payee may spend Social Security money to maintain the beneficiary's home unless:

- the beneficiary has no dependents living there;
- the beneficiary has been gone for six months or more; and
- a doctor certifies that it is unlikely that the beneficiary will return home.

The representative payee must be able to account for the beneficiary's funds and must file, at a minimum, an annual report with the local SSA office describing how the money was spent. A parent or spouse who is the representative payee and lives with the beneficiary does not have to file these annual financial reports.

Representative payees must establish "special needs accounts" for minors whose retroactive payments are more than six (6) times the maximum benefit. These amounts may only be used for certain expenses, which are related to the child's disability and which benefit the child, such as education, personal needs assistance, and special equipment. The rules remain in effect after the minor turns 18, even if there is no longer a representative payee.

How does the representative payee account for the use of benefits?

A representative payee will be required to submit annual written reports to SSA. In order for SSA to confirm how the representative payee is using funds, the payee should keep records of how benefits were used in order to make accounting reports and make those records available upon request. SSA may request the following information from a representative payee:

- where the beneficiary lived during the accounting period;

- who made the decisions on how the benefits were spent or saved;

- how the benefit payments were used; and

- how much of the benefit payments were saved and how the savings were invested.

Who is liable if the representative payee misuses the benefits?

- The representative payee is responsible for paying back the benefits if he or she misuses them. SSA will make every reasonable effort to obtain restitution of misused benefits in order to repay these benefits to the beneficiary.

- SSA will repay benefits in cases where they have determined that a representative payee misused benefits and the payee is serving fifteen (15) or more beneficiaries. SSA will pay the beneficiary or his or her alternative representative payee when it makes restitution an amount equal to the misused benefits less any amount SSA collected from the original rep payee and repaid to the beneficiary.

- SSA will repay benefits if it committed "negligent failure" in its investigation or monitoring of the representative payee which results in misuse of the benefits by an individual payee who is serving no more than fourteen (14) beneficiaries. SSA will pay the beneficiary or his or her alternative representative payee when it makes restitution an amount equal to the misused benefits less any amount SSA collected from the original rep payee and repaid to the beneficiary.

"Negligent failure" means that SSA has failed to investigate or monitor a representative payee or that SSA did investigate or monitor a representative payee but did not follow established procedures in its investigation or monitoring. Examples of SSA's negligent failure include, but are not limited to the following:

- SSA did not follow its established procedures when investigating, appointing, or monitoring a representative payee;

- SSA did not timely investigate a reported allegation of misuse;

- SSA did not take the necessary steps to prevent the issuance of payments to the representative payee after it was determined that the payee misused benefits; or

- SSA's repayment of misused benefits under these provisions does not alter the representative payee's liability and responsibility.

What if the recipient is in an institution?

There are several problems that may arise when institutions rather than individuals act as representative payees. While the following practices are not illegal, they create problems for beneficiaries:

- the SSA automatically designating the institution as the representative payee when the beneficiary is admitted, even if he or she already has one;

- the institution paying itself first for the beneficiary's "maintenance," then giving whatever is left over to the beneficiary;

- the institution pooling the money with that of other Social Security recipients under its care in one bank account and not awarding each beneficiary interest;

- the institution remaining as representative payee after the beneficiary leaves.

However, it is illegal when the institution:

- does not first use benefits for the beneficiary's needs;

- uses the beneficiary's SSI money to pay its costs if the beneficiary has Medicaid or other insurance that will pay, or takes more from the payments than the state allows;

- pays for maintenance, such as cleaning or repairs to the facility;

- pays for improvements to the facility, such as buying new beds or carpeting the activity room;

- pays for items that are supposed to be part of the basic fee, such as sheets and towels;

- pays itself for any debts the beneficiary owes unless there is money left over after the monthly costs are taken care of and the SSA has approved the payment.

How does one object to the appointment of a representative payee or remove or change a representative payee?

Unless the beneficiary is a minor living with parents or guardian or is legally incompetent, the SSA must give the beneficiary notice that it intends to appoint a representative payee. The beneficiary may object to either the decision to appoint a representative payee or the person the SSA chooses. SSA will provide advance written notice to the beneficiary before actually appointing the payee. This notice will afford the beneficiary an opportunity to appeal the representative payee appointment. The advance notice will:

- explain the right of the beneficiary to appeal the determination that a representative payee is necessary;

- explain the right to appeal the choice of a particular person to serve as the representative payee of the beneficiary; and

- explain the right to review the evidence upon which the choice of payee designation is based, and to submit additional evidence.

To appeal, the beneficiary must file a written statement with the local SSA office. If the first appeal is denied, the beneficiary may ask the SSA to reconsider. If not satisfied with the reconsideration decision, the beneficiary may request a hearing before an administrative law judge.

If the beneficiary no longer wants a representative payee, he or she may ask the local SSA office to pay the benefits directly to him or her. The beneficiary should be prepared to present evidence that he or she is capable of handling the benefits. Such evidence may include a note from a doctor or therapist stating that he or she can manage money, or bills and receipts showing that that the beneficiary has "responsibly" spent whatever funds he or she was given by the payee.

If the payee misuses the beneficiary's funds or there is a more appropriate payee available, these are acceptable reasons for ***changing*** the representative payee.

How does one challenge a decision by a representative payee who refuses to increase payments according to the wishes of a beneficiary?

As described above, payees must manage a beneficiary's payments consistent with spending priorities.

When a representative payee refuses to increase payments as a beneficiary requests, the beneficiary should think about whether the payee is following these priorities. If the beneficiary believes the payee is not, the beneficiary may call SSA at 1-800-772-1213 and register a complaint. SSA will contact the beneficiary's local SSA office. The local SSA will then contact the beneficiary and attempt to resolve the problem. If beneficiary is not satisfied, he or she may file an appeal to have the representative payee removed.

Where can one get more information about Social Security and representative payees?

For information and legal advice regarding Social Security and representative payees, contact your local legal services office (the Legal Advocacy and Resource Center, at 617-742-9179, can give you the telephone number). For general information about disability issues, call the Mass. Network of Information Providers for People with Disabilities (800-642-0249) or the Mass. Office on Disability (800-322-2020).

SSA also has a website: www.ssa.gov. See also Part III of this Handbook for other resources.

Social Security has a toll-free number (800-772-1213) for information. Write down the name of the person you speak to, the date and time you called, and what they said for future reference.

CHAPTER 5
HEALTH CARE PROXIES[1]

Massachusetts law allows competent adults to plan ahead for a time when they might not be able to make or communicate their own health care decisions. "Advance directives" are written documents that express a person's preferences for medical care at some future time. In Massachusetts, the advance directive is called a "health care proxy," even though a very similar document is known by different names in other states. The Health Care Proxy Law allows a competent adult to sign a legally-binding document that names another person—a family member or trusted friend—to make health care decisions for the adult in case he or she becomes unable to do that for him or herself.

Designing a Health Care Proxy

What is a health care proxy and how does it work?

A health care proxy is a legal document by which a competent person (the "principal") names a health care "agent" to make all health care decisions should the principal become unable to make them. The health care proxy provides for future medical decision making and, in certain situations, eliminates the need for a guardian.

A health care proxy goes into effect when a person's attending doctor determines in writing that he or she does not have the capacity to make or communicate health care decisions. The treating doctor or facility must then consult with the health care agent who will decide whether to consent to or refuse the recommended medical treatment. The health care agent may make any decision about medical treatment that the principal would have made, including decisions about life-sustaining treatment. The health care agent is also entitled to receive from the doctor or hospital any and all medical information (even confidential medical information) that is necessary to make informed and voluntary decisions for the principal.

What are the requirements of a health care proxy?

The proxy is a document that must contain certain legally required language and must be signed in a proper manner. The proxy must:

- identify the principal and the health care agent;
- indicate that the principal intends to permit the agent to make health care decisions on his or her behalf;

1 MHLAC thanks David B. Clarke, Executive Director of Massachusetts Health Decisions, for his assistance with this chapter.

- describe any limitations on the agent's authority; and

- indicate that the agent's authority becomes effective when it is determined in writing that the principal lacks the capacity to make health care decisions.

The proxy must be a written document that is signed by the principal (age 18 or older) and witnessed by two adults**,** neither of whom can be the agent or alternate agent.

What does a health care proxy look like?

There are many forms for a health care proxy. The most widely used form was developed shortly after the Health Care Proxy Law was enacted by a non-profit organization called Massachusetts Health Decisions, with help from a group of sixteen state agencies and organizations. The form is used by most hospitals, health plans, and health care organizations statewide.[2] See Sample Form 1, below.

In addition, we have included another, more detailed sample form as Sample Form 2 which contains specific sections on treatment for mental illness and life-sustaining treatment. It may not be appropriate for everyone and various sections could be changed or deleted if the principal so chooses.

How can an individual express specific wishes regarding future medical and mental health treatment?

An individual may include specific language in the health care proxy to communicate his or her preferences regarding future medical and mental health treatment. By taking this step, he or she may avoid any problems about the agent's authority to consent to extraordinary medical treatment. This is particularly true for persons with mental illness with strong feelings about the treatment. An individual with specific desires about the use of certain antipsychotic medications, ECT ("shock therapy"), or removal of life support systems should clearly state such desires in the health care proxy.

Can a health care proxy address antipsychotic medication and psychiatric hospitalization?

The short answer to this question is yes. The agent named in a health care proxy is allowed by law to make all decisions for the principal having to do with the diagnosis, prognosis and treatment of a physical or mental illness. But when the Health Care Proxy Law was enacted in 1990, the legislature failed to

2 We have printed a copy of the form here with permission from Massachusetts Health Decisions. It is for individual use only, and may not be reproduced in quantity.

address the system that was in place prior to the proxy law. This system included traditional guardianship and conservatorship, and what has been called a "*Rogers* guardianship," after the legal case that describes an oversight system to protect the safety and liberty of persons in need of mental health care. (See Chapter 2 for more on *Rogers* guardianships.)

Since 1997, through court cases, policy statements from the Department of Public Health, and informal opinions from the Attorney General's office, the clear trend seems to be that agents acting through a validly signed and activated health care proxy may consent to antipsychotic medications for the principal, so long as the principal has not limited the agent's authority in this regard, and has not revoked the proxy itself. If the health care agent consents to the administration of antipsychotic medication and the principal then refuses the medication, this should be deemed a revocation of the health care proxy,at least as to the medication, and the issue of the principal's competence then may have to be determined by the court.

The reasoning of the trend toward empowering the agent with powers previously given only to court-appoint guardians is this: the purpose of court involvement was to insure that a person's rights to liberty and safety were safeguarded. With the proxy, the agent acting for the principal was not appointed by the court, but was voluntarily chosen by the principal him or herself. And the decisions of the agent were subject to the same kind of scrutiny and court oversight, if necessary, as the guardianship system. By the language of the Health Care Proxy Law, the agent must make decisions for the principal in good faith, and the decisions of the agent can be challenged by the Commissioner of Public Health, a health care provider, or even a friend of the principal.

Some hospitals continue to require a health care agent to seek a guardianship with specific court authority to consent to the administration of antipsychotic medication. However, this practice is diminishing as physicians and facilities become more familiar with the broad power of the health care proxy.

Rights of the Principal and Responsibilities of the Agent

May the principal place limitations on the agent?

Yes. The principal may include limitations on the authority of the health care agent. For example, the Massachusetts Supreme Judicial Court decided in Cohen v. Bolduc, 435 Mass 608, 760 N.E.2d 714 (2002) that the health care proxy law allows the agent to commit the principal to a mental health facility unless the principal has expressly limited the agent's authority in the proxy, and so long as the principal does not object at the time of the commitment. If this issue is important to the principal, then the principal needs to be very clear in the proxy that he does or does not want his agent to have the authority to commit him to a mental health facility.

How does the health care agent make the decision?

The health care agent must make decisions in accordance with the principal's wishes, including the principal's moral and religious beliefs. If the agent does not know the principal's wishes, the agent must decide based on what the agent determines would be in the best interests of the principal. Therefore, the principal should give serious thought to the selection of a trustworthy agent. The principal can also write a statement of personal wishes, which while not legally binding, is instructive for the agent. A sample form for this statement is included as Sample Form 3.

Is the health care agent's decision final?

No. The principal always has the right to object to a decision made by the health care agent unless there is a court order to the contrary. In addition, a physician or private facility cannot be forced to honor a request of the agent if it is against the physician's moral or religious views or the facility's religious views as demonstrated in formally adopted policy. However, if a physician refuses to honor the agent's request to give or withhold a specific treatment, then the physician and/or facility must transfer the principal to the care of another doctor *who will honor the agent's request*. Any question about the validity of the proxy or the decision of the agent may be reviewed by a judge.

May the proxy be revoked or cancelled?

Yes. The principal may revoke the proxy at any time and in any manner that demonstrates specific intent to terminate the power. The principal, like any adult, is presumed to be legally competent to revoke the proxy unless a court has decided that the principal is not competent. Even after a doctor determines that the principal lacks capacity, the principal may refuse to accept treatment that has been authorized by the agent, and thereby revoke the proxy. In most cases, such a refusal would prompt a full court determination of legal competency. Also, the proxy is automatically revoked if the principal signs a subsequent proxy, or if the principal gets divorced and the spouse was the agent.

Can a person be forced to sign a health care proxy?

No. A person may not be required to sign a proxy as a condition of receiving health care services. Most hospitals and nursing homes must offer new patients the opportunity to sign a health care proxy upon admission, but it is not required that the patient signs one in order to gain admission.

Who should keep the proxy?

After completing the proxy, the principal should make at least four copies and keep the original in an easily accessible place (not in a safe deposit box).

The principal should give one copy to one's primary care doctor to place in the medical record, one copy to the named agent, one copy to the alternate agent if any, and any remaining copies to family members or other individuals who may become involved in health care decision making.

Other Considerations

Will every provider honor the proxy?

No**,** unfortunately not every provider can be relied upon to accept directions from a health care agent, especially regarding end-of-life care or care that the doctor simply does not agree with for religious, professional, or personal reasons. Some providers may express the concern that the proxy may have been revoked by the principal him or herself. If the proxy addresses end-of-life issues and home hospice care is arranged, the issue need not arise.

People also should be aware of the potential for challenges to the proxy by family members or others who may disagree with the principal's wishes as expressed either by the principal him or herself, or by the agent, or with the agent's sole determination of what would be in the principal's best interest if his/her specific wishes are unknown. Family members and others may also challenge the proxy document itself, either by contending that the principal was not competent to sign it when s/he did, or that the principal's signature was forged or procured by fraud or deceit, or that the witnesses didn't actually witness the principal sign the document.

What are "psychiatric advance directives" and "living wills"? Are they legally binding in Massachusetts?

Psychiatric advance directives (sometimes referred to as "PADs") and living wills are also advance directives and give instructions about future mental health and medical treatment. Advance directives, in general, allow a competent person to give instructions regarding treatment he or she may receive in case of future incapacity. The difference between the PADs and living wills is that PADs refer to psychiatric preferences while living wills refer to medical decisions at the end of life. PADs and living wills are similar in purpose to health care proxies, but do not involve appointing an agent. A PAD may include an individual's wishes regarding hospital admittance, electroconvulsive therapy, and administration of medication. In states that allow PADs, these documents may be useful to express an individual's wishes for future mental health treatment.

The General Laws of Massachusetts do not provide for living wills or PADs. Under the laws for health care proxies, an individual may appoint an agent to make decisions, but cannot create a legally binding PAD or living will. As discussed in the previous question, specific preferences similar to what would be

included in a PAD or living will may be included in the health care proxy, but the law still instructs health care professionals to seek instructions from the agent.

Although PADs and living wills are not in and of themselves legally binding, they still may be quite useful, as is the statement of personal wishes, addressed earlier in this chapter and at Sample Form 3 at the end of this chapter. As provided by a health care proxy, a trustworthy agent should use "substituted judgment," meaning that he or she makes decisions based on what the principal would do in the present situation if that person were competent. Thus, any documentation of preferences by the principal can help the agent make a decision in accordance with the wishes of the principal.

Any document that states an individual's wishes for future medical and psychiatric care is valuable and instructive and can ease the burden of loved ones when making future decisions.

MASSACHUSETTS HEALTH CARE PROXY

Information, Instructions, and Form

What does the Health Care Proxy Law allow?

The **Health Care Proxy** is a simple legal document that allows you to name someone you know and trust to make health care decisions for you if, for any reason and at any time, you become unable to make or communicate those decisions. It is an important document, however, because it concerns not only the choices you make about your health care, but also the relationships you have with your physician, family, and others who may be involved with your care. Read this and follow the instructions to ensure that your wishes are honored.

Under the Health Care Proxy Law (Massachusetts General Laws, Chapter 201D), any competent adult 18 years of age or over may use this form to appoint a Health Care Agent. You (known as the "Principal") can appoint any adult EXCEPT the administrator, operator, or employee of a health care facility such as a hospital or nursing home where you are a patient or resident UNLESS that person is also related to you by blood, marriage, or adoption. Whether or not you live in Massachusetts, you can use this form if you receive your health care in Massachusetts.

What can my Agent do?

Your Agent will make decisions about your health care *only* when you are, for some reason, unable to do that yourself. This means that your Agent can act for you if you are temporarily unconscious, in a coma, or have some other condition in which you cannot make or communicate health care decisions. Your Agent cannot act for you until your doctor determines, in writing, that you lack the ability to make health care decisions. Your doctor will tell you of this if there is any sign that you would understand it.

Acting with your authority, your Agent can make any health care decision that you could, if you were able. If you give your Agent full authority to act for you, he or she can consent to or refuse any medical treatment, including treatment that could keep you alive.

Your Agent will make decisions for you only after talking with your doctor or health care provider, and after fully considering all the options regarding diagnosis, prognosis, and treatment of your illness or condition. Your Agent has the legal right to get any information, including confidential medical information, necessary to make informed decisions for you.

Your Agent will make health care decisions for you according to your wishes or according to his/her assessment of your wishes, including your religious or moral beliefs. You may wish to talk first with your doctor, religious advisor, or other people before giving instructions to your Agent. It is very important that you talk with your Agent so that he or she knows what is important to you. If your Agent does not know what your wishes would be in a particular situation, your Agent will decide based on what he or she thinks would be in your best interests. After your doctor has determined that you lack the ability to make health care decisions, if you still object to any decision made by your Agent, your own decisions will be honored unless a Court determines that you lack capacity to make health care decisions.

Your Agent's decisions will have the same authority as yours would, if you were able, and will be honored over those of any other person, except for any limitation you yourself made, or except for a Court Order specifically overriding the Proxy.

How do I fill out the form?

1 At the top of the form, print your full name and address. Print the name, address, and phone number of the person you choose as your Health Care Agent. (**Optional:** If you think your Agent might not be available at any future time, you may name a second person as an Alternate Agent. Your Alternate Agent will be called if your Agent is unwilling or unable to serve.)

2 Setting limits on your Agent's authority might make it difficult for your Agent to act for you in an unexpected situation. If you want your Agent to have full authority to act for you, leave the limitations space blank. However, if you want to limit the kinds of decisions you would want your Agent or Alternate Agent to make for you, include them in the blank.

3 **BEFORE** you sign, be sure you have two adults present who will be witnesses and watch you sign the document. The only people who cannot serve as witnesses are your Agent and Alternate Agent. Then sign the document yourself. (Or, if you are physically unable, have someone other than either witness sign your name at your direction. The person who signs your name for you should put his/her own name and address in the spaces provided.)

4 Have your witnesses fill in the date, sign their names and print their names and addresses.

5 **OPTIONAL:** On the back of the form are statements to be signed by your Agent and any Alternate Agent. This is not required by law, but is recommended to ensure that you have talked with the person or persons who may have to make important decisions about your care and that each of them realizes the importance of the task they may have to do.

Who should have the original and copies?

After you have filled in the form, remove this information page and make at least four photocopies of the form. Keep the original yourself where it can be found easily (*not* in your safe deposit box). Give copies to your doctor and/or health plan to put into your medical record. Give copies to your Agent and any Alternate Agent. You can give additional copies to family members, your clergy and/or lawyer, and other people who may be involved in your health care decisionmaking.

How can I revoke or cancel the document?

Your Health Care Proxy is revoked when any of the following four things happens:

1. You sign another Health Care Proxy later on.
2. You legally separate from or divorce your spouse who is named in the Proxy as your Agent.
3. You notify your Agent, your doctor, or other health care provider, orally or in writing, that you want to revoke your Health Care Proxy.
4. You do anything else that clearly shows you want to revoke the Proxy, for example, tearing up or destroying the Proxy, crossing it out, telling other people, etc.

AFTER FILLING IN THE FORM, REMOVE THIS INSTRUCTION PAGE. BE SURE TO TALK WITH YOUR AGENT.

MASSACHUSETTS HEALTH CARE PROXY

1 I, _____, residing at
(Principal: PRINT your name)

_____
(Street) (City/town) (State)

appoint as my **Health Care Agent**: _____
(Name of person you choose as Agent)

of _____
(Street) (City/town) (State)

Agent's tel (h) _____ (w) _____ E-mail _____

OPTIONAL: If my agent is unwilling or unable to serve, then I appoint as my **Alternate Agent**:

_____
(Name of person you choose as Alternate Agent)

of _____
(Street) (City/town) (State) (Phone)

2 My Agent shall have the authority to make all health care decisions for me, including decisions about life-sustaining treatment, subject to any limitations I state below, if I am unable to make health care decisions myself. My Agent's authority becomes effective if my attending physician determines in writing that I lack the capacity to make or to communicate health care decisions. My Agent is then to have the same authority to make health care decisions as I would if I had the capacity to make them **EXCEPT** (here list the limitations, *if any*, you wish to place on your Agent's authority):

I direct my Agent to make health care decisions based on my Agent's assessment of my personal wishes. If my personal wishes are unknown, my Agent is to make health care decisions based on my Agent's assessment of my best interests. Photocopies of this Health Care Proxy shall have the same force and effect as the original and may be given to other health care providers.

3 **Signed**: _____

Complete only if Principal is physically unable to sign: I have signed the Principal's name above at his/her direction in the presence of the Principal and two witnesses.

_____ _____
(Name) (Street)

_____
(City/town) (State)

4 **WITNESS STATEMENT:** We, the undersigned, each witnessed the signing of this Health Care Proxy by the Principal or at the direction of the Principal and state that the Principal appears to be at least 18 years of age, of sound mind and under no constraint or undue influence. Neither of us is named as the Health Care Agent or Alternate Agent in this document.
In our presence, on this day ____/____/____ (mo / day / yr).

Witness #1 _____ Witness #2 _____
(Signature) (Signature)

Name (print) _____ Name (print) _____

Address _____ Address _____

_____ _____

5

Statements of Health Care Agent and Alternate Agent (OPTIONAL)

Health Care Agent: I have been named by the Principal as the Principal's **Health Care Agent** by this Health Care Proxy. I have read this document carefully, and have personally discussed with the Principal his/her health care wishes at a time of possible incapacity. I know the Principal and accept this appointment freely. I am not an operator, administrator or employee of a hospital, clinic, nursing home, rest home, Soldiers Home or other health facility where the Principal is presently a patient or resident or has applied for admission. But if I am a person so described, I am also related to the Principal by blood, marriage, or adoption. If called upon and to the best of my ability, I will try to carry out the Principal's wishes.

(Signature of **Health Care Agent**)_____

Alternate Agent: I have been named by the Principal as the Principal's **Alternate Agent** by this Health Care Proxy. I have read this document carefully, and have personally discussed with the Principal his/her health care wishes at a time of possible incapacity. I know the Principal and accept this appointment freely. I am not an operator, administrator or employee of a hospital, clinic, nursing home, rest home, Soldiers Home or other health facility where the Principal is presently a patient or resident or has applied for admission. But if I am a person so described, I am also related to the Principal by blood, marriage, or adoption. If called upon and to the best of my ability, I will try to carry out the Principal's wishes.

(Signature of **Alternate Agent**)_____

* * * * *

Health Care Proxy form developed by Massachusetts Health Decisions in association with the following member organizations of the Massachusetts Health Care Proxy Task Force:

Boston University Schools of Medicine and Public Health:
Law, Medicine, and Ethics Program
Deaconess ElderCare Program
Hospice Federation of Massachusetts
Massachusetts Bar Association
Massachusetts Department of Public Health
Massachusetts Executive Office of Elder Affairs
Massachusetts Federation of Nursing Homes
Massachusetts Health Decisions
Massachusetts Hospital Association
Massachusetts Medical Society
Massachusetts Nurses Association
Medical Center of Central Massachusetts
Suffolk University Law School:
Elder Law Clinic
University of Massachusetts at Boston:
The Gerontology Institute
Visiting Nurse Associations of Massachusetts

Providers: For prices and information on quantity orders, or for non-English language licensing, please contact
Massachusetts Health Decisions, PO Box 417, Sharon, MA 02067
Email: proxy@masshealthdecisions.org

rev. 09/07

Wallet card

Once you have completed a health care proxy you may want to carry a card, such as the one below, in your wallet that can alert medical treatment providers to the existence of the proxy in case of medical emergencies. This is a sample only - it is not a legally binding document but it would serve the purpose of letting providers know of your healthy care proxy.

Please be advised that I, _____(your name),
have appointed _____(name of principal) as
my health care agent.
This person has a copy of my completed health care proxy.
He/She may be reached via phone at (____)____-_____
and resides at _____
Alternate Contact_____
Alternate Phone (___)____-_____

Printed Name: _____
Signed Name: _____
Address: _____
_____
Phone Number: (___)____-_____

B. Sample Health Care Proxy

The next sample form provided by Robert H. Weber[3] is a way to make explicit your wishes related to end-of-life care, and you could also use the last section ("additional guidance") to make explicit your wishes regarding psychiatric medications or other treatment.

3 Robert H. Weber, Esq. of Weber and Baum, www.weberandbaum.com

SAMPLE HEALTH CARE PROXY

MASSACHUSETTS HEALTH CARE PROXY

TO MY FAMILY, DOCTORS, AND ALL THOSE CONCERNED
WITH MY CARE:

1. Appointment

I, _____ (the principal), residing at _____ , Massachusetts, being a competent adult at least eighteen years of age or older, of sound mind and under no constraint or undue influence, hereby appoint the following person to be my HEALTH CARE AGENT under the terms of this document:

Name: _____

Address: _____ , Massachusetts

Telephone: _____

In so doing, I intend to create a Health Care Proxy according to Chapter 201D of the General Laws of Massachusetts. In making this appointment, I am giving my Health Care Agent the authority to make any and all health care decisions on my behalf, including decisions about life-sustaining treatment, subject to any limitations I state in this document, in the event that I should at some future time become incapable of making health care decisions for myself.

2. Alternate Appointment

I hereby appoint the following person to serve as my Health Care Agent in the event that my original Health Care Agent is not available, willing or competent to serve and is not expected to become available, willing or competent to make a timely decision given my medical circumstances, or in the event that my original Health Care Agent is disqualified from acting on my behalf.

Name: _____

Address: _____

Telephone: _____

3. Powers Given to Health Care Agent

A. I give my Health Care Agent full authority to make any and all health care decision for me including decisions about life-sustaining treatment, subject only to the limitations I state below.

B. My Health Care Agent shall have authority to act on my behalf only if, when and for so long as a determination has been made that I lack the capacity to make or to communicate health care decision for myself. This determination shall be made in writing by my attending physician according to accepted standards of medical judgment and the requirements of Chapter 201D of the General Laws of Massachusetts.

C. The Authority of my Health Care Agent shall cease if my attending physician determines that I have regained capacity. The authority of my Health Care Agent shall recommence if I subsequently lose capacity and consent for treatment is required.

D. I shall be notified of any determination that I lack capacity to make or communicate health care decisions where there is any indication that I am able to comprehend this notice.

E. My Health Care Agent shall make health care decisions for me only after consultation with my health care providers and after full consideration of acceptable medical alternatives regarding diagnosis, prognosis, treatments and their side effects.

F. My Health Care Agent shall make health care decisions for me only in accordance with my Health Care Agent's assessment of my wishes, including my religious and moral beliefs, or, if my wishes are unknown, in accordance with my Health Care Agent's assessment of my best interests.

G. My Health Care Agent shall have the right to receive any and all medical information necessary to make informed decisions regarding my health care, including any and all confidential medical information that I would be entitled to receive.

H. The decisions made by my Health Care Agent on my behalf shall have the same priority as my decisions would have if I were competent over decisions by any other person, including a person acting pursuant to a durable power of

attorney, except for any limitation I state below or a specific Court Order overriding this Health Care Proxy.

I. If I object to a health care decision made by my Health Care Agent, my decision shall prevail unless it is determined by Court Order that I lack capacity to make health care decisions.

J. Nothing in this proxy shall preclude any medical procedure deemed necessary by my attending physician to provide comfort care or pain alleviation including but not limited to treatment with sedatives and painkilling drugs, non-artificial oral feeding, suction, and hygienic care.

K. **(OPTIONAL)** I understand that by signing this document I am giving my health care agent the authority to exercise his/her best judgment regarding all health care decisions including decisions about life-sustaining treatment. Regarding decisions about life-sustaining treatment, as authorized under Section 5 of M.G.L. c. 201D, it is my desire that my agent may be guided by the following statement of my beliefs. I believe that death is a natural part of life. Dying should not be unnecessarily prolonged, to my own detriment and indignity, and to the agony of my family. While I believe in the sanctity of life, I feel that circumstances may exist in which the effort to sustain my life may itself degrade or demean the humanity without which I feel my life has no meaning. I believe also that I have the right to refuse medical treatment, whether or not I am mentally competent to do so, and that my family, guardian, attorney and physicians should undertake to act under this statement without guilt or feeling of responsibility on their part, since their actions are in furtherance of my wishes. Therefore, if I should become unable to participate meaningfully in decisions concerning my medical care and treatment, under the circumstances described below, or under similar circumstances, it is my desire that my wishes as described be carried out, as expeditiously as possible. This statement is made after careful consideration and reflection, and with full awareness of the pain, indignity, and discomfort which may itself accompany the withholding or withdrawal of care and sustenance, but with also the fullest faith that the judgment of my family and physicians in making any decision will comport with my wishes. It is therefore my intention that these directions be honored by my family and physicians as a final reflection of my legal right to refuse medical treatment under the conditions specified, and I accept the consequences of this refusal.

1. If I come to suffer an injury, disease or illness considered incurable and terminal by my physicians, I direct my physicians and all medical personnel to withhold or withdraw all life-sustaining procedures which would serve only to prolong the dying process artificially, whether considered active or passive, ordinary or extraordinary, including, without limitation, the withholding of food and water.

2. If I suffer serious and irreversible brain damage as a result of any illness or injury to the extent that I have lost cognitive function with no significant likelihood of regaining it, whether or not I am terminally ill, I

direct my physicians and all medical personnel to withhold or withdraw all life-sustaining procedures which would serve only to prolong the dying process artificially, whether considered active or passive, ordinary or extraordinary, including without limitation the withholding of food and water.

L. I specifically limit my Health Care Agent's authority as follows:

(OPTIONAL)

Example

1. I acknowledge that I received medication for the treatment of mental illness in the past. Some of these medications I have found helpful, and others have caused me discomfort and have not been helpful. I have expressed my feelings about these medications to my health care agent and I have faith that she will only consent to the administration of medications or treatments that I would consent to if I were competent. However by executing this health care proxy it is my intention to limit my agent's authority by :

2. My agent may only consent to the following medication or treatment's if they are prescribed by my treating psychiatrist. (if they are prescribed by Dr. "X".) (if they are required to permit me to remain out of a psychiatric hospital.) My agent may not consent to the administration of any other treatment or medication for the treatment of my mental condition.

3. My agent may consent to the administration of any medication or treatment that is prescribed by my treating psychiatrist except.

4. My agent may consent to any medication, but she may not consent to the administration of electro-convulsive therapy.

4. Revocation

This Health Care Proxy shall be revoked upon any one of the following events:

A. my execution of a subsequent Health Care Proxy;

B. my divorce or legal separation from my spouse where my spouse is named as my Health Care Agent;

C. my notification to my Health Care Agent or a health care provider orally or in writing or by any other act evidencing a specific intent to revoke the Health Care Proxy.

5. Signature of Principal

I hereby sign my name to this Health Care Proxy in the presence of two witnesses.

Signature: _____

Date:

Complete here if the principal is physically incapable of signing:

I hereby sign the name of the principal at the principal's direction and in the presence of the principal and two witnesses.

Name of Principal: _____

Name of Signatory: _____
Date:

Address of Signatory: _____

_____

6. Witnesses

WITNESS ONE: I, the undersigned, have witnessed the signing of this document by the principal or at the direction of the principal and state that the principal appears to be at least eighteen years of age, of sound mind and under no constraint or undue influence. I have not been named as Health Care Agent or alternate Health Care Agent in this document.

Signature: _____

Name (print): _____

Address: _____

_____

Date:

WITNESS TWO: I, the undersigned, have witnessed the signing of this document by the principal or at the direction of the principal and state the principal appears to be at least eighteen years of age, of sound mind and under no constraint or undue influence. I have not been named as Health Care Agent or alternate Health Care Agent in this document.

Signature: _____

Name (print): _____

Address: _____

_____

Date:

7. Statement of Health Care Agent and Alternate (Optional)

Health Care Agent:

I have been named by the principal as the principal's Health Care Agent in this document.

(Please check one)

___ I am **not** an operator, administrator or employee of a hospital, clinic, nursing home, rest home, Soldiers Home or other facility defined in section 70E of chapter 111 of the General Laws of Massachusetts where the principal is presently a patient or resident or has applied for admission.

___ I am an operator, administrator or employee of a hospital, clinic, nursing home, rest home, Soldiers Home or other facility defined in section 70E of chapter 111 of the General Laws of Massachusetts where the principal is presently a patient or resident or has applied for admission, and I am also related to the principal by blood, marriage, or adoption.

I have read this document carefully and accept the appointment.

_____
Signature of Health Care Agent

Alternate Health Care Agent

I have been named by the principal as the principal's alternate Health Care Agent in this document.

___ I am **not** an operator, administrator or employee of a hospital, clinic, nursing home, rest home, Soldiers Home or other facility defined in section 70E of chapter 111 of the General Laws of Massachusetts where the principal is presently a patient or resident or has applied for admission.

___ I am an operator, administrator or employee of a hospital, clinic, nursing home, rest home, Soldiers Home or other facility defined in section 70E of chapter 111 of the General Laws of Massachusetts where the principal is presently a patient or resident or has applied for admission, and I am also related to the principal by blood, marriage, or adoption.

I have read this document carefully and accept the appointment.

_____
Signature of Alternate Health Care Agent

Sample Form 3

PERSONAL WISHES STATEMENT

This form is an expression of my wishes and not legally binding.
I, _____, sign this form for the purpose of offering my Health Care Agent guidance so that he or she may make decisions based on an assessment of my personal wishes as well as medical information provided by my physicians. My Health Care Agent has authority to make such decisions in accordance with Massachusetts law. This form is an expression of my wishes and not legally binding.

If there is no reasonable expectation for my recovery and, in the opinion ofmy physician, I will die without life sustaining treatment that only prolongs the dying process, I ask that my Health Care Agent consider the following (initial lines that express your wishes)

_____ Treatment should be given to maintain my dignity, keep me comfortable and relieve pain.
_____ If my heart stops, I do not want it to be restarted.
_____ If I stop breathing, I do not want to have a breathing tube put into my throat and be hooked up to a breathing machine.
_____ My physician may withdraw or withhold treatment that only serves to prolong the dying process. Some examples of types of such treatment include:
_____ If I cannot drink, I do not want to receive fluids through a needle placed in my vein unless necessary to keep me comfortable.
_____ If I cannot eat, I do not want a tube inserted in my nose, mouth or surgically placed to give me food.
_____ If I have an infection, I do not want antibiotics administered to prolong my life without hope of cure unless necessary to keep me comfortable.
_____ If possible, I would like to die at home with hospice care, if needed.
_____ Unless necessary for my comfort, I would prefer NOT to be hospitalized.
_____ My faith tradition is _____.

My spiritual contact person is_____ .

My faith community is _____.
_____ I wish to have spiritual support.
_____ I do not wish spiritual support.
_____ If possible, I wish to be an organ donor.
_____ Following is additional guidance for my Health Care Agent's consideration:
_____

_____

_____

Signature: _____ Date: _____

This Personal Wishes Statement was adapted from "My Choices: An Advance Directive for Health Care Choices." Missoula Demonstration Project, Missoula, Montana, and prepared by The Central Massachusetts Partnership to Improve Care at the End of Life. The Partnership grants permission to reproduce this document in its entirety, so long as the source, including this statement, is shown. 12/03

PART III
TECHNICAL INFORMATION, RESOURCES AND GLOSSARY

This part provides technical information for both pursuing and opposing a guardianship or conservatorship in court. It also includes resources such as legal services and social services agencies. Lastly, there is a glossary of terms.

Technical Information

Persons entitled to petition for guardianship or conservatorship

A parent, two or more relatives or friends, certain nonprofit corporations such as the local Associations for Retarded Citizens, or any agency within the Executive Office of Human Services including the Departments of Mental Health and Mental Retardation, may file a petition in probate court requesting a guardian or conservator. The petition should be filed in the local probate court in the county in which the ward is an inhabitant or resident. The petitioner need not be the person who will act as guardian or conservator.

Information necessary to petition for guardianship

1) Ward's name, age, present address, and permanent address;

2) The proposed guardian's name, address and relationship to the ward;

3) The petitioner's name, address and relationship to the ward;

4) Names and last known addresses of any relatives;

5) Documentation of efforts to contact the relatives concerning the intent to secure a guardian. Potential heirs must, by law, be given an opportunity to object to the guardianship.

6) The size of the ward's estate, separating real estate from personal property;

7) The names and addresses of persons who may be willing to serve as surety on the bond;

8) Reasons guardianship or conservatorship is necessary. If requesting

guardianship or conservatorship on an emergency basis, a description of the emergency;

9) The name and address of the treating psychiatrist and for a person with mental retardation and the names and addresses of the other members of the clinical team; and

10) Description of the ward's present medical treatment and any possible future treatment.

11) Documentation from medical experts about the person's inability to handle personal affairs:

    a) For **persons with mental illness**: a medical certificate should be obtained attesting to the person's inability to care for self or finances. The physician must examine the person and sign the certificate no more than 30 days prior to the entry of the guardianship or conservatorship decree. Medical certificate forms are available at the Registry of Probate, in the courthouse.

    b) For **persons with mental retardation**: a "clinical team report" or "CTR" must be obtained from a physician, social worker and a licensed psychologist, all experienced with mental retardation, stating that they have examined the person and believe he or she is incapable of making informed decisions about personal and/or financial affairs by reason of mental retardation. The examinations must take place no more than 180 days prior to the filing of the petition. Court forms are available from the Registry of Probate.

To obtain such a report, if the person is in an institution, contact the head of the institution. Otherwise, one must find the three requisite professionals: a physician, licensed psychologist, and social worker. Consider contacting a family physician, staff at a local mental health center, or professionals through the local Department of Mental Retardation area office. The clinicians must examine the individual no more than 180 days before the guardianship petition is filed in probate court.

Time frames for obtaining guardianship or conservatorship

Although the amount of time varies from one court to another, permanent guardianship and conservatorship can take between 4-8 weeks from the time of filing to obtain, and longer if contested or the whereabouts of the heirs are unknown. An uncontested temporary guardianship usually takes about 7-10 days. In an emergency, a temporary guardianship or conservatorship may be obtained in a matter of hours or days.

Cost to obtain a guardianship or conservatorship

If the petitioner retains an attorney to pursue a guardianship or conservatorship, the cost includes attorney's fees as well as court costs and fees. An uncontested case will cost less in attorney's fees. The ward's estate may pay these fees if the guardianship is successful.

If the proposed ward is indigent and receiving services from the Departments of Mental Health or Mental Retardation, the Department may obtain guardianship at no cost to the ward, but this rarely happens except in *Rogers* cases. Otherwise, the petitioner may be financially responsible.

Requirement of a "bond"

Before the court will appoint a guardian, he or she must file a bond with the court. A bond is a form of insurance to protect the ward from an inept or dishonest guardian or conservator. A bond is supported by "sureties," either "personal" (two individuals) or "corporate" (a bonding company) which will pay if the guardian or conservator misuses the ward's money and cannot be found or cannot repay the money. The court requires a corporate surety for large estates. Occasionally, the judge will consider waiving the sureties, but only in cases of small estates or those cases involving guardianship of the person only (and not the estate).

Notice

Unless the court considers the case an emergency, the court must notify the following people:

1) potential ward;

2) heirs apparent or presumptive;

3) the Department of Mental Retardation if the petition is filed pursuant to Massachusetts General Laws, chapter 201, section 6A;

4) Veterans Administration (if the person is entitled to veterans' benefits);

5) if the ward was receiving public assistance, the IV-D agency; and

6) if a durable power of attorney exists or health care proxy exists, the holder of such power or proxy.

An individual can determine in a variety of ways if notice has been given. The potential ward:

1) received service in hand;

2) may contact the Department Mental Retardation in the case of a petition filed pursuant to Massachusetts General Laws, chapter 201, section 6A;

3) if in an institution or a program, may ask if anyone has contacted the institution or program to get a clinical team report or physician's certificate;

4) may check the local probate court records (they are open to the public);

5) may read the local newspaper for legal notices (notice is placed in the paper when there are no known addresses for the relatives).

The notice lists a return day. This is the deadline for objecting to the guardianship. **This is the most important date on this notice**. If no one objects by that date, most judges will approve the guardianship, at least temporarily, and the ward will not have had a chance to present his or her side of the story. The return day for a temporary guardianship usually is three (3) days from the day on which the potential ward receives the notice. The return day for a permanent guardianship is at least seven (7) days from the date the potential ward receives the notice.

In emergencies, a temporary guardianship may be ordered without giving any prior notice to the ward. The ward must be notified within three (3) days of the appointment of the guardian. The notice must inform the ward that she has the right to request the court to vacate or amend its decision.

Whenever temporary guardianship is requested, courts require that a permanent guardianship petition be filed. Hence, the potential ward may receive two different notices and two different return dates. The earlier of the two return dates is the one of immediate importance and the potential ward should object by that date.

Objecting to the petition for guardianship

The court must give notice of the filing of the petition for guardianship or conservatorship to the ward and heirs at law, typically the closest relatives. This notice is called a "citation" and is an official court document. If the ward or any relative objects to the proceedings, the ward or ward's attorney must notify the court before the date stated on the citation. After the objection is filed, the person

asking for the guardianship or conservatorship must request a court hearing on the petition and the ward must be given notice of the hearing. The ward has a right to appear at the hearing and contest the guardianship or conservatorship. Although some probate courts regularly appoint an attorney for the ward, the ward is entitled to have a lawyer only in cases where the guardian is seeking the authority to admit the ward to a mental health or mental retardation facility or authorization for extraordinary medical treatment, including anti-psychotic medication. In these situations, called *Rogers* cases (discussed in Chapter 2), the court must appoint and pay for the attorney if the ward is indigent, and the hearing cannot go forward without the attorney.

In an emergency, a temporary guardian may be appointed for a short period of time without prior notice to the ward and without an opportunity for the ward to be heard. In such a situation, the ward must be informed of his or her right to request removal of the emergency temporary guardianship.

The ward may object either to the guardianship or conservatorship itself, or to the particular individual seeking to become guardian or conservator. The guardian or conservator may not deprive the ward of the right to use the ward's funds to hire a lawyer for this purpose but once appointed the guardian is not required to keep the ward's attorney apprised of ongoing matters. The Supreme Judicial Court has held that "when no adversary proceedings have been initiated, due process does not require that a ward be able to consult with counsel about his guardianship." Guardianship of Hocker, 439 Mass. 709, 717 (2003). However, the Massachusetts Appeals Court has recently held that a non-indigent ward has the right to an evidentiary hearing to determine his or her capacity to retain independent counsel of his or her choosing. Guardianship of Zaltman, 65 Mass. App. Ct. 678, 688 (2006) ("The fact that [the ward] was earlier found 'incapable of taking care of herself by reason of mental illness' did not mean that she remained indefinitely incompetent to choose and hire (at her own expense) an attorney to represent her interests, even were there no evidence of a significant change in her mental condition.").

The most effective way to fight a guardianship is to obtain a lawyer who will file the proper forms and go to court. If, however, the potential ward is to represent himself or herself, the first step is to "file an appearance" and state an objection to the appointment of a guardian. The appearance notifies the court that the potential ward objects. The potential ward can file an appearance by writing a letter to the court, as shown by the example below.

SAMPLE LETTER:

Your present address
Date

Register
Probate and Family Court Department
County Division
Address

Re: Case Name and Docket Number (shown on notice)

I wish to file an appearance on my behalf to protest the appointment of a temporary and/or permanent guardian or conservator for myself. My telephone number is

Sincerely yours,

Your full legal name, printed and your signature

If the petitioner is seeking both permanent and temporary guardianship, the potential ward could object to both. The potential ward also may use this process to object to the person who is being proposed as guardian, as well as to request a limited guardianship.

In any case, it is extremely important to file an objection **before the return date**. It is more difficult to win a case if the objection is filed after the return date.

Legal representation for the ward

The ward may represent him or herself in court, but it is not easy to be successful without a lawyer. It is generally up to the client to find and pay the attorney, or if indigent, obtain one from the local legal aid organization.

There are a few exceptions where the ward is entitled to an attorney, including the following two. When a guardianship is sought for authorizing admission to a mental health or mental retardation facility, a hearing must be held and the ward must be given a free lawyer if unable to pay for a private lawyer. The court should not begin the hearing unless an attorney is present to represent the ward. The ward must be present at the hearing except under extraordinary circumstances, in which case the ward's attorney must nevertheless be present. Only in cases of "extreme emergency" may a guardian be given the authority to admit when neither the ward nor the ward's counsel is present. Similarly, the ward is entitled to a lawyer if the petitioner is seeking the authority to administer extraordinary forms of medical treatment such as antipsychotic medication.

Preparing for a hearing

The potential ward usually is much better able to present an effective case when represented by a lawyer. With or without a lawyer, preparation for a guardianship hearing involves a number of steps:

1) Gather facts about the potential ward that indicate an ability to make informed decisions.

   For an allegedly mentally retarded person:

- evidence of adequate intellectual functioning;
- evidence of training programs completed in money management, basic living skills, and sex education;
- special activities demonstrating ability to make decisions;
- employment history, especially if it shows stability or ability to earn a living;
- ability to communicate with reading and writing skills, though not essential;
- indications of willingness to seek guidance on decisions, and names of people willing to give advice;
- estimate of potential for growth, given more education.

   For an allegedly mentally ill person:

- signs of progress in treatment programs;
- if institutionalized, access to off grounds privileges, decrease in amount of supervision, preparation for discharge to a less restrictive environment, participation in work or training programs;
- employment history, especially if recent and stable;
- level of education, especially if high;
- support systems in the environment where the person will be living, *i.e.*, job, school, supportive family, friends who expressed interest, outpatient treatment program.

It will be crucial to have an expert testify in favor of the potential ward. Usually a psychiatrist is best, although a social worker or psychologist can be helpful too. The doctor should examine the potential ward and form an opinion on his or her ability to manage personal and financial affairs. If the ward is indigent, a motion to the court may be made for an independent psychiatrist to examine the potential ward free of charge.

2) Gather facts about the potential guardian.

   - signs of lack of concern for the ward such as few visits or refusal to participate in annual reviews;
   - lack of year-round availability;
   - conflicts of interest such as a husband suing his wife for divorce while trying to become her guardian;
   - documented hostility or abusiveness towards the potential ward;
   - history of financial abuse of potential ward;
   - name of an appropriate person willing to become guardian.

3) If guardianship appears likely, suggest a limited guardianship or a less restrictive alternative and be prepared to present the reasons such limitations are appropriate.

The hearing

A hearing is held at which the judge weighs the evidence and either approves or rejects the guardianship or conservatorship. The hearing usually is held in a courtroom. The attorney may offer advice as to whether the potential ward should attend or speak, but ultimately the decision should be made by the potential ward. If the potential ward does not have an attorney and wishes to object, he or she should attend the hearing and be prepared to present the information described above. The judge will observe the potential ward's dress and demeanor. The judge will take evidence from the potential guardian, which typically includes testimony from a doctor and, then, from the potential ward. The judge may ask questions about how the potential ward intends to make a living, get psychiatric treatment (if that is an issue), find a place to live, and continue to function if guardianship is not ordered. Usually the judge will make a decision at the end of the hearing, although the judge may take the case "under advisement" and make a decision several days later.

In certain emergency situations, the court may authorize guardianships for a short period of time without the ward having an opportunity to be heard. This is a temporary guardianship, and would have a review date prior to which the ward would have to get notice and have the opportunity to come to court to contest the guardianship.

Appellate rights

Probate court decisions on guardianship and conservatorship can be appealed to the Appeals Court, and then to the Massachusetts Supreme Judicial Court. The appeal will address any errors of law that were made by the trial judge. It is almost impossible to appeal successfully without a lawyer. However, guardianship decisions are never really permanent. The probate court has the authority to modify guardianship decisions at any time, and there is no limit to the number of times an individual can request the court to act. Thus, the ward may have a greater chance of success if she returns to court and asks the judge to modify the earlier decision because of a change in circumstances.

Duration of guardianship or conservatorship

A permanent guardianship or conservatorship lasts until at least one of the following happens: the ward dies, the court orders the guardianship or conservatorship terminated due to the ward's improved judgment and capacity, or in the case of a guardianship of a minor, the ward achieves majority or marries. For guardianships authorizing administration of antipsychotic medication, see Chapter 2: Other Guardianship Issues.

A temporary appointment lasts up to 90 days and may be renewed once for an additional 90 days. (In the case of a temporary guardianship of a minor, in practice the 90-day temporary guardianship may be renewed several times before a permanent guardianship hearing is set.) When a temporary appointment is requested, permanent guardianship or conservatorship also must be requested. However, the court may grant the request for temporary guardianship without acting on the permanent guardianship. The court will not grant the permanent order unless the petitioner requests action. If the temporary guardianship expires without action to renew it properly, the request for the permanent order may lapse or the ward may request that the court dismiss it.

A guardianship may outlast a particular guardian if: (l) the guardian dies; (2) the guardian voluntarily resigns; or (3) the court removes the guardian for failure to properly perform duties. In each of these situations, the guardianship continues and the court will consider a petition to fill the vacancy. If no one comes forward with a petition, the court, on its own motion, may appoint a successor. The same procedure applies to conservatorships.

Termination or modification of the guardianship

A guardianship or conservatorship may be either terminated or modified if the ward becomes more capable. The judge must approve the termination or modification.

When guardianship is obtained for a person whose disability may decrease over time, the ward's lawyer (or any interested party) and the guardian's lawyer should make a written agreement, incorporated into the guardianship decree, that the need for guardianship will be reviewed periodically. If the ward's needs change, the guardian should go back to court to ask for the removal or a restricting of his or her powers.

All guardianships involving extraordinary medical treatment must be reviewed periodically by the probate court. Most courts require the review to take place every 3-6 months.

Guardianships and conservatorships for persons with mental retardation are fairly difficult to terminate because of the assumption that the ward's abilities will not improve.

Resignation of guardian or conservator

The guardian or conservator may resign with the court's permission. The court may require assurances that the resignation would not create a crisis for the ward. The court might ask the guardian or conservator to help find a replacement. The resigning person must file a final account of all of her expenditures on behalf of the ward. The court must approve this account before the guardian or conservator resigns.

Removal of a guardian or conservator who is inappropriate

A guardian or conservator may be removed if he or she is not acting appropriately. One should carefully document any abuses that have occurred, including requests for money or decisions that have been ignored and any misuse of the ward's funds. Aside from abuse, a guardian or conservator may just not be able to adequately perform his or her duties if, for example, he or she has too many wards. The ward, or anyone on the ward's behalf, including the Department of Mental Health or the Department of Mental Retardation, may ask the court at any time to discharge a specific guardian or conservator or to terminate the guardianship or conservatorship.

Resources

Legal Advocacy and Legal Resource Agencies

Boston Bar Association's Lawyer Referral Service

The Lawyer Referral Service provides a referral to an attorney in your city or town who handles a specific kind of legal problem. The referral service is free and the initial half-hour appointment with your attorney will cost no more than $25.00.

Monday through Friday, 8:00am-5:30pm at (617) 742-0625

Center for Public Representation
www.centerforpublicrep.org

The Center for Public Representation is a non-profit public interest law firm providing mental health law and disability law services. Based in Massachusetts, with offices in Northampton and Newton, the Center is engaged in activities both in the state and throughout the nation.

246 Walnut St.
Newton, MA 02460
(617) 965-0776
Email: info@cpr-ma.org

Western Mass office:
22 Green St.
Northampton, MA 01060
Voice and TTY (413) 586-6024

Disability Law Center
www.dlc-ma.org

DLC is a private, non-profit organization responsible for providing protection and advocacy for the rights of Massachusetts residents with disabilities. They provide information, referral, technical assistance and representation regarding legal rights and services for people with disabilities.

11 Beacon Street, Suite 925
Boston, Massachusetts, 02108
Voice: (617) 723-8455 / (800) 872-9992

32 Industrial Drive East
Northampton, Massachusetts, 01060
Voice: (413) 584-6337 / (800) 222-5619
TTY: (617) 227-9464 / (800) 381-0577 TTY: (413) 582-6919
Email: mail@dlc-ma.org

Health Law Advocates, Inc.
www.hla-inc.org

HLA is a public interest law firm affiliated with Health Care For All, a health advocacy organization in Massachusetts. HLA provides free legal representation to eligible consumers who live or work in Massachusetts and seek access to health care.

30 Winter Street, Suite 940
Boston, MA 02108
(617) 338-5241

Legal Advocacy and Resource Center
www.larcma.org

LARC operates a free legal hotline in support of its mission to help low-income Massachusetts residents with legal problems by providing quality legal information and advice, and by making referrals to legal and social service agencies.

197 Friend Street, 9th Floor
Boston, MA 02114
Hotline: 617-603-1700
or 800-342-LAWS

Massachusetts Bar Association Dial-a-Lawyer call-in program

On the first Wednesday of each month, from 5:30 to 7:30 p.m., volunteer lawyers are available to answer your basic legal questions by phone. Dial-a-Lawyer may be reached at (617) 338-0610.

Massachusetts Bar Association's Lawyer Referral Service

There is no charge to call the Lawyer Referral Service, and your first half-hour consultation with an LRS attorney is only $25.

Boston: (617) 654-0400 or
TDD (617) 338-0585,
Outside Boston: (800) 392-6164

Massachusetts Legal Reform Institute
www.mlri.org

MLRI is a nonprofit statewide legal services support center. In general, MLRI does not represent individual clients may be able to provide brief advice and referrals to other agencies that might be able to help.

99 Chauncy Street, 5th Floor
Boston, MA 02111
(617) 357-0700

Mental Health Legal Advisors Committee
http://www.mass.gov/mhlac

Established by the Massachusetts Legislature, the Mental Health Legal Advisors Committee exists to secure and protect the legal rights of persons involved in mental health and retardation programs in the Commonwealth. MHLAC provides legal representation, information, and referrals to individuals with mental disabilities and thier advocates.

399 Washington Street, 4th Floor
Boston, MA 02108
(617)338-2345
(800)342-9092 (Massachusetts only)

Volunteer Lawyers Project
www.vlpnet.org

The Volunteer Lawyers Project of the Boston Bar Association provides legal representation in civil matters to the indigent of Boston through the *pro bono* services of private attorneys and paralegals.

99 Chauncy St., 4th Floor
Boston, MA 02111
Voice: (617) 423-0648
TTY: (617) 338-6790

Mental Health and Mental Retardation Advocacy Agencies

The Arc
www.thearc.org

The Arc of the United States advocates for the rights and full participation of all children and adults with intellectual and developmental disabilities.

The Arc of Massachusetts
www.arcmass.org

The Arc of Massachusetts advocates for supports and services based in the community to enhance the lives of individuals with intellectual and developmental disabilities and their families.

217 South Street
Waltham, MA 02453
(781) 891-6270
Email: arcmass@arcmass.org

Bazelon Center for Mental Health Law
www.bazelon.org

The Bazelon Center for Mental Health Law uses a coordinated approach of litigation, policy analysis, coalition-building, public information and technical support in four areas of advocacy: advancing community membership, promoting self-determination, ending the punishment of people with mental illnesses for the system's failures, and preserving rights.

Cape Organization for Rights of the Disabled
www.cordonline.org

CORD advocates for the rights of handicapped/disabled people and promotes a barrier-free environment for all.

1019 Iyannough Road #4
Hyannis, MA 02601
(518) 775-8300 or (800) 541-0282 (both numbers: voice/TTY)
Email: coreen@cape.com

Health Care for All
www.hcfama.org

HCFA empowers Massachusetts consumers to know more about our health care system and to become involved in changing it. HCFA's work combines policy analysis, information referral, personal and legal advocacy, community organizing and public education.

30 Winter Street, 10th floor
Boston, MA, 02108
Voice: (617) 350-7279
Health Care Helpline: **(800) 272-4232**
TTY: (617) 350-0974

Massachusetts Association for Mental Health
www.mamh.org

Through its network of volunteers, MAMH provides education, advocacy, leadership and information to agencies, individuals, and families on national, state and local mental health issues.

130 Bowdoin Street, Ste 309
Boston, MA 02108
(617) 742-7452
Email: infomamh@mamh.org

Massachusetts People/Patients Organized for Wellness, Empowerment, and Rights (M-POWER)
www.m-power.org

M-POWER is a member run organization of mental health consumers and current and former psychiatric patients. We advocate for political and social change within the mental health system, the community, city, and statewide.

98 Magazine Street
Roxbury MA 02119
(617) 442-4111 or (877) 769-7693
Email: info@m-power.org

National Alliance for the Mentally Ill
www.nami.org

NAMI is the nation's largest grassroots mental health organization dedicated to improving the lives of persons living with serious mental illness and their families.

National Alliance of Mental Illness of Massachusetts
www.namimass.org

NAMI-MA is a nonprofit grassroots education and advocacy group dedicated to improving the quality of life for people affected by mental illness in Massachusetts.

400 West Cummings Park, Suite 6650
Woburn, MA 01801
(781) 938-4048

National Institute of Mental Health
www.nimh.nih.gov

NIMH is the lead Federal agency for research on mental and behavioral disorders.

National Empowerment Center
www.power2u.org

NEC has a toll-free information and referral line. They have information about topics such as advance directives, shock treatment, schizophrenia, self-help groups in one's area, legal services in one's area, meditation and self-help techniques, coping with depression, etc.

599 Canal Street
Lawrence, MA 01840
(978) 685-1494 or (800) 769-3728

Email: info4@power2u.org

Parent Professional Advocacy League
www.ppal.net

PAL promotes a strong voice for families of children and adolescents with mental health needs. PAL advocates for supports, treatment and policies that enable families to live in their communities in an environment of stability and respect.

45 Bromfield Street, 10th Floor
Boston, MA 02108
(617) 542-7860 or (866) 815-8122
Email: info@ppal.net

Ruby Rogers Advocacy and Drop-In Center

64 Union Square
Somerville, MA 02143
(617) 625-9933

State Agencies

Department of Mental Health
www.mass.gov/dmh

Central Office
25 Staniford Street
Voice: (617) 626-8000
TTY: (617) 727-9842
Boston, MA 02114
Email: dmhinfo@dmh.state.ma.us

Department of Mental Retardation
www.mass.gov/dmr

Central Office
500 Harrison Avenue
Boston, MA 02118
Voice: (617) 727-5608
TTY: (617) 624-7783
Email: Info@state.ma.us

Department of Transitional Assistance
www.mass.gov/dta

Central Office
Application Information Unit:
600 Washington Street
Boston, MA 02111
(617) 348-8500
(800) 249-2007

Disabled Persons Protection Commission
www.mass.gov/dppc

50 Ross Way
Quincy, MA 02169
(617) 727-6465
Hotline: (800) 426-9009 V/TTY

Executive Office of Elder Affairs
www.mass.gov/elders
One Ashburton Place, 5th Floor
Boston, MA 02108
Voice: (617) 727-7750
TTY: (800) 872-0166
(800) 882-2003 (MA only)
Elder Abuse Hotline: (800) 922-2275 (Voice/TTY)
Email: elder.affairs@state.ma.us

Massachusetts Commission Against Discrimination
www.mass.gov/mcad

Boston Office
One Ashburton Place
6th Floor, Room 601
Boston, MA 02108
(617) 994-6000

Springfield Office
436 Dwight Street
Second Floor, Room 220
Springfield, MA 01103
(413) 739-2145

Massachusetts Office on Disability
www.mass.gov/mod

One Ashburton Place, Room 1305
Boston, MA 02108
(617) 727-7440
(800) 322-2020 (Voice/TTY)

Massachusetts Rehabilitation Commission
www.mass.gov/mrc

27 Wormwood Street
Boston, MA 02210
(617) 204-3600
(800) 245-6543 (Voice/TDD)

Divisions of the Massachusetts Probate Court

Barnstable Probate and Family Court

Probate and Family Court Department
Main Street, P.O. Box 346
Barnstable Division
Barnstable, MA 02630
Probate/Estates (508) 375-6725
Guardianship/Equity (508) 375-6730

Berkshire Probate and Family Court

Berkshire Probate and Family Court
44 Bank Row
Pittsfield, MA 01201
Main Number (413) 442-6941

Bristol Probate and Family Court

Bristol Probate and Family Court
11 Court Street
Taunton, MA 02780
Taunton Session (508) 824-4004
Fall River Session (508) 672-1751
New Bedford Session (508) 999-5249

Dukes Probate and Family Court

Dukes County Probate and Family Court
P.O. Box 237
81 Main Street
Edgartown, MA 02539
Main Numbers (508) 627-4703 and (508) 627-4704

Essex Probate and Family Court (Salem and Lawrence)

Essex Probate and Family Court
36 Federal Street
Salem, MA 01970
Salem Main Number (978) 744-1020

Essex Probate and Family Court
2 Appleton Street
Lawrence, MA 01840
Lawrence Main Number (978) 686-9692

Franklin Probate and Family Court

Franklin Probate and Family Court
425 Main St.
P.O. Box 590
Greenfield, MA 01302
Main Numbers (413) 774-7011
(413) 774-7012, and (413) 774-7013

Hampden Probate and Family Court

Probate and Family Court Department
50 State Street
Springfield, MA 01102-0559
Office Manager (413) 748-6058
Probate and Equity (413) 748-7745
First Assistant Register (413) 748-7786

Hampshire Probate and Family Court

Hampshire Probate and Family Court
33 King Street, Suite 3
Northampton, MA 01060
Registry of Probate (413) 586-8500

Middlesex Probate and Family Court

Probate and Family Court Department
Middlesex County Division
208 Cambridge Street
P.O. Box 410480
East Cambridge, MA 02141-0006
Probate (617) 768-5858
Register's Office (617) 768-5808

Nantucket Probate and Family Court

Nantucket Probate and Family Court Department
16 Broad Street
P.O. Box 1116
Nantucket, MA 02554
Main Numbers (508) 228-2669
and (508) 228-6852

Norfolk Probate and Family Court

Probate and Family Court
Norfolk Division
35 Shawmut Road
Canton, MA 02021
Main Number (781) 830-1200

Plymouth Probate and Family Court
*A session is held in Brockton. All papers must be filed in Plymouth

Plymouth Probate and Family Court
P.O. Box 3640
Plymouth, MA 02361
Brockton Switchboard (508) 897-5400
Plymouth Session (508) 747-6204

Suffolk Probate and Family Court

Suffolk Probate and Family Court

P.O. Box 9667
24 New Chardon Street, 3rd Floor
Boston, MA 02114
Registry (617) 788-8300

Worcester Probate and Family Court

Worcester Probate and Family Court

Registry of Probate
2 Main Street
Worcester, MA 01608
Main Number (508) 770-0825

Additional Information on Guardianship and Alternatives

American Bar Association Commission on Law and Aging - *Consumer's Toolkit for Health Care Advance Planning*
www.abanet.org/aging/toolkit/home.html

Toolkit includes 10 tools for health care decision making:

1) How to select your Health Care Agent or Proxy

2) Are Some Conditions Worse Than Death?

3) How Do You Weigh Odds of Survival?

4) Personal Priorities and Spiritual Values Important to Your Medical Decisions

5) After Death Decisions to Think About Now

6) Conversation Scripts: Getting Past the Resistance

7) The Proxy Quiz for Family and Physician

8) What to Do After Signing Your Health Care Advance Directive

9) Guide for Health Care Proxies

10) Resources: Advance Planning for Health Care

Massachusetts Trial Court Law Libraries - *Law about Guardianship/ Conservatorship*
http://www.lawlib.state.ma.us/guardian.html

This site provides links to guardianship forms and the law regarding guardians and conservators.

Massachusetts Trial Court Law Libraries - *Legal Forms*
www.lawlib.state.ma.us/forms.html

A list of legal forms available by topic, including (but not limited to): guardian/conservator, health care proxy, landlord/tenant, living will, probate court forms, trusts, and wills and estates.

Massachusetts Trial Court Law Libraries - *Massachusetts Law About Health Care Proxies*
http://www.lawlib.state.ma.us/healthproxy.html

Includes:

-Massachusetts Statutes Chapter 201D (Health Care Proxies) and 201B (Uniform Durable Power of Attorney Act)
-Massachusetts Regulations 130 CMR 450.112 (Advance Directives)
-Federal Statutes
-Forms
-Secondary Sources
-Articles
-Internet Resources

Massachusetts Trial Court Law Libraries - *Massachusetts Law about Elders' Issues*
www.lawlib.state.ma.us/elder.html

This site provides links to various resources dealing with loss of capacity, elder law, and end-of-life issues.

Neighborhoodlaw.org - *Substituted Judgment*
www.neighborhoodlaw.org/page/57632&cat_id=565

A guide to guardianships, conservatorships, powers of attorney, and other alternatives, prepared by the Elder Law Project of Legal Services for Cape Cod and Islands, Inc. This site addresses questions that commonly arise when dealing with issues of mental capacity and describes alternative solutions.

Supplemental Needs Trusts: The Centerpiece of Estate Planning for Parents of Children with Disabilities - Moschella & Winston, LLP
http://www.moschellawinston.com/Elder-Law-Medical-Disabilyt-PDF/Supplemental-Needs-Trusts-2003.pdf

This site includes a guide to trusts and their use in planning and caring for children with disabilities during the parents' life, and continuing after the parents' death.

National Consumer Law Center - *Avoiding Living Trust Scams: A Quick Guide for Advocates*
www.nclc.org/initiatives/seniors_initiative/avoid_scam.shtml

This site provides a basic understanding of a trust, living trust, will, and probate. It differentiates between a living trust and a will, identifies common living trust scams, and remedies available.

Further additional information

Cornell Law School - *Mental Health Law: An overview*
www.law.cornell.edu/wex/index.php/Mental_Health

This provides a short overview of the relationship between the mental health field and the law. Specifically, it addresses constitutional standards to consider when forcing an individual with mental disabilities into treatment.

General Laws of Massachusetts - Chapter 19: Department of Mental Health
www.mass.gov/legis/laws/mgl/gl-19-toc.htm

General Laws of Massachusetts - Chapter 123: Mental Health
www.mass.gov/legis/laws/mgl/gl-123-toc.htm

Massachusetts Trial Court Law Libraries - *Law Regarding Self-Represented Litigants*
www.lawlib.state.ma.us/prose.html

A series of resources for those representing themselves, including information on what the court can and cannot do for you, how to conduct yourself in court.

Massachusetts Trial Court Law Libraries - *Massachusetts Law about Health Care*
www.lawlib.state.ma.us/health.html

Topics include (but are not limited to): Health, Health Care Issues, Health Care Personal Representatives, Medical Care, Parent's How-To Guide on Children's Mental Health Services in Massachusetts, Responding to Scenes Involving Minors Refusing Treatment or Transport.

Sharinglaw.net
http://www.sharinglaw.net/disability/helplinks.htm

This site provides legal information and useful links for individuals with special needs and disabilities.

WebMD - Mental Health Center
http://www.webmd.com/mental-health/default.htm

This site provides general information about mental illness including descriptions of disorders and treatments commonly used.

Glossary

Agent: One who is nominated or appointed to act on behalf of another, who is the principal.

Beneficiary: A broad definition for any person or entity (like a charity) who is to receive assets or profits from an estate, a trust, an insurance policy, or other instrument in which there is distribution. A 'third party beneficiary' is an individual, or entity, who receives an intended benefit from a contract to which he/she/it was not an original party.

Case Manager: The individual(s) who oversee another's case management. Case management is a collaborative process of assessment, planning, facilitation, and advocacy for options and services to meet an individual's health needs through communication and available resources to promote quality outcomes.

Conservator: An individual appointed by a judge to protect and manage the financial affairs of another person who cannot manage his or her own affairs due to physical or mental limitations, or old age. In this process, someone petitions the appropriate local court for appointment of a specific conservator, with written notice served on the potential conservatee. An open hearing is held before the appointment is made. The conservator is required to make regular accountings which must be approved by the court. The conservator may be removed by order of the court if no longer needed, upon the petition of the conservatee or relatives, or for failure to perform his or her duties.

Competence: To have competence, or to be "competent", a person must be generally able to act in the circumstances, including the ability to perform a job or occupation, or to reason or make decisions. There can be different areas of competence. For example, in **wills, trusts and contracts**, competence is mental ability to understand and execute a document. In **criminal law**, competence is being mentally able to stand trial, which includes understanding the proceedings and being able to assist in his or her defense.

Disability: 1) A condition which prevents an individual from performing all usual physical or mental functions. This usually means a permanent state, such as blindness, but in some cases may be a temporary state, such as depression. 2) A legal impediment, such as being a minor, under age 18, and therefore unable to enter into contracts.

Developmental disability: Severe, life-long disability attributable to mental and/or physical impairments, manifested before the age of 22. The term is used most commonly to refer to disabilities affecting daily functioning in three or more of the following areas: capacity for independent living, economic self-sufficiency,

learning, mobility, receptive and expressive language, self care, and self direction. A few examples of developmental disabilities include autism, cerebral palsy, and learning disabilities.

(Durable) Power of Attorney: A written document signed by a person giving another person the power to act in conducting the signer's business, including signing papers, checks, title documents, contracts, handling bank accounts and other activities in the name of the person granting the power. There are two types of power of attorney: a) general power of attorney, which covers all activities, and b) special power of attorney, which grants powers limited to specific matters, such as selling a particular piece of real estate, handling some bank accounts or executing a limited partnership agreement. A power of attorney may expire on a date stated in the document or upon written revocation.

Fiduciary: 1) A person, or business, who has the power and obligation to act for another, the beneficiary, under circumstances of good faith and honesty; 2) A situation or relationship in which a person acts as a fiduciary for another individual.

Fiduciary Relationship: Where one person places confidence in another in regard to a particular transaction or one's general affairs or business. The relationship is not necessarily formally or legally established as in a declaration of trust, but can be one of moral or personal responsibility, due to the superior knowledge and training of the fiduciary as compared to the one whose affairs the fiduciary is handling.

Grantor: A party who transfers/confers title in property to another by deed.

Guardian: A person who has been appointed by a judge to take care of a minor child or incompetent adult (both called "ward") personally and/or to manage that person's affairs. To become a guardian of another individual the court must be petitioned. In the case of a minor, the guardianship remains under court supervision until the child reaches majority at 18.

Guardianship: The fiduciary relationship that develops as a result of the court order appointing an individual ("ward") a guardian, whereby the guardian assumes the power to make decisions about the ward's person or property in the best interest of the ward.

Health care proxy/ Advanced directive: A health care proxy is one form of advance medical directive. Advance medical directives pertain to treatment preferences and the designation of a surrogate decision-maker in the event that a person becomes unable to make medical decisions on his or her own behalf. The health care proxy is a legal document in which an individual designates another person to make health care decisions if he or she is rendered incapable of making

his or her wishes known. The health care proxy has, in essence, the same rights to request or refuse treatment that the individual would have if capable of making and communicating decisions.

Inpatient Treatment: Treatment services offered or provided for a continuous period of more than twenty-four (24) hours in residence after admission to a mental health or substance abuse treatment facility for the purpose of observation, evaluation or treatment.

Insurance: A contract (insurance policy) in which the insurer (insurance company) agrees for a fee (insurance premiums) to pay the insured party all or a portion of any loss suffered by accident or death. The losses covered by the policy may include property damage or loss from accident, fire, theft or intentional harm; medical costs and/or lost earnings due to physical injury; long-term or permanent loss of physical capacity; claims by others due to the insured's alleged negligence (e.g. public liability auto insurance).

Living Trust: A trust created and executed by declaration during the grantor's lifetime, as distinguished from a "testamentary trust," which is created by a will and only comes into force upon the death of the person who wrote the will. A living trust is a generic name for any trust which comes into existence during the lifetime of the person or persons creating the trust, most commonly it is a trust in which the trustor(s) receive benefit(s) from the profits of the trust during their lifetimes, followed by a distribution upon the death of the last trustor to die, or the trust continues on for the benefit of others (such as the next generation) with profits distributed to them. There are other types of living trusts including irrevocable trust, insurance trust, charitable remainder trust and some specialized trusts to manage some parts of the assets of a person or persons.

Medicaid: A program managed by the states and funded jointly by the states and federal government to provide health insurance for individuals and families with low incomes and resources. Among the groups of people served by Medicaid are eligible low-income parents, children, seniors, and people with disabilities. Medicaid is the largest source of funding for medical and health-related services for people with limited income

Medicare: A health insurance program administered by the United States government, covering people who are either age 65 and over, or who meet other special criteria.

Mental Illness: A broad generic label for a category of illnesses that may include affective or emotional instability, behavioral dysregulation, and/or cognitive dysfunction or impairment. Specific illnesses known as mental illnesses include major depression, generalized anxiety disorder, bipolar disorder, schizophrenia, and attention deficit hyperactivity disorder, to name a few. Mental illness can be

of biological (e.g., anatomical, chemical, or genetic) and/or environmental (e.g., trauma or conflict) origin. It can impact one's ability to work or go to school and contribute to problems in relationships. Other generic names for mental illness include "mental disorder", "psychological or psychiatric disorder", "abnormal psychology", "emotional problem", or "behavior problem". The term insanity is sometimes still used technically as a legal term.

Principal: Person who has permitted or directed another (the agent) to act on his or her behalf for his or her benefit.

Psychiatrist: Individuals who hold a degree in medicine (M.D.) and specialize in psychiatry, where the primary goal is to improve people's mental well-being. This can be by managing and improving the symptoms of specific mental illness as well as assisting people to gain insight into themselves and their relationships with others. It should be noted that psychiatrists can prescribe medications while psychologists cannot prescribe medication.

Psychologist: A scientist and/or clinician who studies psychology, the systematic investigation of the human behavior and mental processes. Psychologists are usually categorized under a number of different fields, the most well-recognized being clinical psychologists, who provide mental health care, and research psychologists, who collect, investigate and analyze aspects of human behavior. It should be noted that psychologists are able to provide treatment for mental illness; however they are **not** able to prescribe medication.

Settlor: A person who creates a trust by a written trust declaration. The settlor usually transfers the original assets into the trust.

Social Services Agency: Services generally provided by the government that help improve people's standard of living. Examples may be social work agencies, hospitals, and clinics.

Special Needs Trust (Supplemental Needs Trust): A type of trust created to ensure that beneficiaries who are developmentally disabled or mentally ill can enjoy the use of property which is intended to be held for their benefit. In addition to personal planning reasons for such a trust (the person may lack the mental capacity to handle their financial affairs), there may be fiscal advantages to the use of a trust. Such trusts may also avoid beneficiaries losing access to essential government benefits.

Trust: An entity created to hold assets for the benefit of certain persons or entities, with a trustee managing the trust (and often holding title on behalf of the trust). Most trusts are founded by the persons (called trustors, settlors and/or donors) who execute a written declaration of trust which establishes the trust and spells out the terms and conditions upon which it will be conducted. The

declaration also names the original trustee or trustees, successor trustees or means to choose future trustees. The assets of the trust are usually given to the trust by the creators, although assets may be added by others and are distributed to the beneficiaries.

Trustee: A person or entity who holds the assets of a trustee for the benefit of the beneficiaries and manages the trust and its assets under the terms of the trust stated in the declaration of trust which created it.

Ward: A person (usually a minor or a person with mental disability) who has a guardian appointed by the court to care for and take responsibility for that person. A child may, in certain contexts, be referred to as a "ward of the state" if he or she is in the custody of the Department of Social Services.